S. HRG. 101-247, PT. 1

REPORT OF THE SENATE IMPEACHMENT TRIAL COMMITTEE ON THE ARTICLES AGAINST JUDGE WALTER L. NIXON, JR.

HEARINGS

BEFORE THE

SENATE IMPEACHMENT TRIAL COMMITTEE
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

THE ARTICLES OF IMPEACHMENT AGAINST JUDGE WALTER L. NIXON, JR., A JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, FOR HIGH CRIMES AND MISDEMEANORS

MAY 16, 1989
ORGANIZATIONAL MEETING OF THE COMMITTEE

PRETRIAL FILINGS OF THE PARTIES

JULY 13, 1989
PRETRIAL HEARING ON MOTIONS

COMMITTEE ORDERS OF JULY 25 AND JULY 27, 1989

Part 1 of 4 Parts

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IMPEACHMENT TRIAL COMMITTEE
ON THE ARTICLES AGAINST JUDGE WALTER L. NIXON, Jr.

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COMMITTEE ESTABLISHED TO RECEIVE AND REPORT EVIDENCE WITH RESPECT TO ARTICLES OF IMPEACHMENT AGAINST JUDGE WALTER L. NIXON, JR.

[From the Congressional Record—Senate, May 11, 1989]

The **President** pro tempore. The majority leader is recognized.

Mr. **Mitchell.** Mr. President, on behalf of myself and the distinguished Republican leader, Mr. Dole, I send a resolution to the desk on the appointment of an impeachment trial committee, and ask for its immediate consideration.

The **President** pro tempore. The clerk will report the resolution. The legislation clerk read as follows:

A resolution (S. Res. 128) to provide for the appointment of a committee to receive and to report evidence with respect to articles of impeachment against Judge Walter L. Nixon, Jr.

The **President** pro tempore. Is there objection to the immediate consideration of the resolution?

There being no objection, the Senate proceeded to consider the resolution.

The **President** pro tempore. The question is on agreeing to the resolution.

The resolution (S. Res. 128) was agreed to, as follows:

S. RES. 128

Resolved. That pursuant to Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, the Presiding Officer shall appoint a committee of twelve senators to perform the duties and to exercise the powers provided for in the rule.

Sec. 2. The majority and minority leader shall each recommend six members to the Presiding Officer for appointment to the committee. The committee shall designate one of its members to be chairman and one of its members to be vice chairman.

Sec. 3. The committee shall be deemed to be a standing committee of the Senate for the purpose of reporting to the Senate resolutions for the criminal or civil enforcement of the committee's subpoenas or orders, and for the purpose of printing reports, hearings, and other documents for submission to the Senate under Rule XI.

Sec. 4. During proceedings conducted under Rule XI, the chairman of the committee is authorized to waive the requirement under the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials that questions by a Senator to a witness, a manager, or counsel shall be reduced to writing and put by the Presiding Officer.

Sec. 5. In addition to a certified copy of the transcript of the proceedings and testimony had and given before it, the committee is authorized to report to the Senate a statement of facts that are uncontested and a summary, with appropriate references to the record, of evidence that the parties have introduced on contested issues of fact.

Sec. 6. The actual and necessary expenses of the committee, including the employment of staff at an annual rate of pay, and the employment of consultants with prior approval of the Committee on Rules and Administration at a rate not to exceed the maximum daily rate for a standing committee of the Senate, shall be paid from the contingent fund of the Senate from the appropriation account "Miscellaneous Items" upon vouchers approved by the chairman of the committee, except that no voucher shall be required to pay the salary of any employee who is compensated at an annual rate of pay.

Sec. 7. The Secretary shall notify the House of Representatives and counsel for Judge Walter L. Nixon, Jr., of this resolution.

Mr. **Mitchell.** Mr. President, I move to reconsider the vote by which the resolution was agreed to.

Mr. **Dole.** I move to lay that motion on the table.

The motion to lay on the table was agreed to.

III

101st CONGRESS
1st Session

S. RES. 128

To provide for the appointment of a committee to receive and to report evidence with respect to articles of impeachment against Judge Walter L. Nixon, Jr.

IN THE SENATE OF THE UNITED STATES

May 11 (legislative day, January 3), 1989

Mr. Mitchell (for himself and Mr. Dole) submitted the following resolution; which was considered and agreed to

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RESOLUTION

To provide for the appointment of a committee to receive and to report evidence with respect to articles of impeachment against Judge Walter L. Nixon, Jr.

Resolved, That pursuant to rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, the Presiding Officer shall appoint a committee of twelve Senators to perform the duties and to exercise the powers provided for in the rule.

Sec. 2. The majority and minority leader shall each recommend six members to the Presiding Officer for appointment to the committee. The committee shall designate one of its members to be chairman and one of its members to be vice chairman.

SEC. 3. The committee shall be deemed to be a standing committee of the Senate for the purpose of reporting to the Senate resolutions for the criminal or civil enforcement of the committee's subpoenas or orders, and for the purpose of printing reports, hearings, and other documents for submission to the Senate under rule XI.

SEC. 4. During proceedings conducted under rule XI the chairman of the committee is authorized to waive the requirement under the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials that questions by a Senator to a witness, a manager, or counsel shall be reduced to writing and put by the presiding officer.

SEC. 5. In addition to a certified copy of the transcript of the proceedings and testimony had and given before it, the committee is authorized to report to the Senate a statement of facts that are uncontested and a summary, with appropriate references to the record, of evidence that the parties have introduced on contested issues of fact.

SEC. 6. The actual and necessary expenses of the committee, including the employment of staff at an annual rate of pay, and the employment of consultants with prior approval of the Committee on Rules and Administration at a rate not to exceed the maximum daily rate for a standing committee of the Senate, shall be paid from the contingent fund of the Senate from the appropriation account "Miscellaneous

Items" upon vouchers approved by the chairman of the committee, except that no voucher shall be required to pay the salary of any employee who is compensated at an annual rate of pay.

SEC. 7. The Secretary shall notify the House of Representatives and counsel for Judge Walter L. Nixon, Jr., of this resolution.

○

APPOINTMENT OF COMMITTEE MEMBERS UNDER IMPEACHMENT RULE XI

[From the Congressional Record--Senate, May 11, 1989]

The President pro tempore. The majority leader is recognized.

Mr. Mitchell. Mr. President, in accordance with the resolution on the appointment of an Impeachment Trial Committee, I recommend to the Chair the appointment of Senators Fowler, Heflin, Wirth, Reid, Robb, and Kohl.

The President pro tempore. The minority leader is recognized.

Mr. Dole. Mr. President, in accordance with the resolution on the appointment of an Impeachment Trial Committee, I recommend to the Chair the appointment of Senators Hatch, Danforth, Chafee, Murkowski, Jeffords, and Mack.

The President pro tempore. Pursuant to Senate Resolution 128 on the appointment of an Impeachment Trial Committee and Impeachment Rule XI, the Chair appoints upon the recommendations of the two leaders the following Senators to be members of the committee to receive and report evidence in the impeachment of Judge Walter L. Nixon, Jr.:

Senators Fowler, Helfin, Wirth, Reid, Robb, Kohl, Hatch, Danforth, Chafee, Murkowski, Jeffords, and Mack.

The majority leader is recognized.

Mr. Mitchell. Mr. President, the resolution on the appointment of an Impeachment Trial Committee provides that the committee shall designate one of its members to be chairman and one of its members to be vice chairman. The Committee on Rules and Administration will be providing its hearing room, SR-301, to the impeachment committee for an organizational meeting on Tuesday, May 16, at 4 p.m.

The President pro tempore. The Senate will take further proper order, and notify the House of Representatives, and counsel for Judge Nixon.

Mr. Mitchell. Mr. President, that completes action on this matter.

IMPEACHMENT TRIAL COMMITTEE ON THE ARTICLES AGAINST JUDGE WALTER L. NIXON, JR.

TUESDAY, MAY 16, 1989

U.S. Senate,
Impeachment Trial Committee,
Washington, DC.

The committee met, pursuant to notice, at 4 p.m., in room SR-301, Russell Senate Office Building, Hon. Wyche Fowler, Jr. (chairman of the committee) presiding.

Present: Senators Fowler, Heflin, Wirth, Reid, Robb, Kohl, Hatch, Danforth, Chafee, Murkowski, Jeffords, and Mack.

Counsel present: Michael Davidson, Senate Legal Counsel; Alan Baron, special counsel, House of Representatives; David Stewart, counsel for Judge Walter L. Nixon, Jr.

Staff present: Tony Harvey and Barbara Thoreson.

Senator **Heflin**. We will come to order. I have been asked to preside initially in this. Maybe this is a little background. This committee basically, at least Senator Hatch and my experience on the Claiborne matter would indicate under the rules—and Mike Davidson, the Senate Legal Counsel, is here—and we will call on him a little later to give some information on procedure.

But basically, we are a committee that will hear the evidence, collect the evidence. It will then be printed and be presented to each Senator for the deliberations on the Floor. There is a lot of leeway in regards to whether the Senate wants to have actual testimony. They can vote and determine what they want to do. In the Claiborne matter, they did not give testimony on the Floor; but it was all taken at the committee.

We do not make a recommendation. Under the rule, we merely collect the evidence; and it is printed, and then it is given to each Senator for deliberation.

The first order of business is the election of the chairman and the vice chairman. It is my understanding that the Majority Leader and the Minority Leader have discussed this; and that Senator Fowler was approached to be the chairman, and Senator Hatch to be the vice chairman.

But we go through the process of electing in regards to this. And so I am going to call for nominations, and I nominate Senator Fowler for chairman and Senator Hatch for vice chairman.

So the floor is open for other nominations relative to chairman.

Senator **Chafee**. You second the nomination, too?

Senator **Heflin**. Well, I will if you want me to. [Laughter.]

Are there any other nominations?

[No response.]

Senator **Heflin**. If not, then all those in favor of Senator Fowler being chairman, let it be known by saying aye.

[A chorus of ayes.]

Senator **Heflin**. All opposed—nay.

[No response.]

Senator **Heflin**. The ayes appear to have it. All right, now the nomination is open for the position of vice chairman; and I nominate Senator Hatch. Are there other nominations?

[No response.]

Senator **Heflin**. If not, then the nominations are closed; and all those in favor of Senator Hatch as the vice chairman let it be known by saying aye.

[A chorus of ayes.]

Senator **Heflin**. All opposed—nay.

[No response.]

Senator **Heflin**. It is declared. Senator Fowler, you take over as chairman.

The **Chairman**. Thank you, Your Honor. Thank you gentlemen, for this extraordinary expression of confidence. [Laughter.]

Gentlemen, I am new at this business, as you undoubtedly know. Mr. Mike Davidson is our general counsel. And I understand we are going to vote no later than 5 o'clock; but I do not want to keep anybody here very long on the procedure.

I will do a little studying and consultation with my distinguished vice chairman, who has been through this business before; and we will have recommendations for you at our next meeting.

But Mike, why do you not try to give us a short synopsis of what our responsibilities and obligations are, and also, what we can expect in terms of time commitments and at least the procedure that has been followed in others. Where we have the flexibility to change them, then we will make that decision among ourselves, if we want to try to improve on the system.

Mr. **Davidson**. Let me begin by noting for you that special counsel for the House and counsel for Judge Nixon are here. They have come to witness these proceedings.

The **Chairman**. Good, let us introduce them.

Mr. **Davidson**. Alan Baron is special counsel to the House.

The **Chairman**. Yes, I know Mr. Baron.

Mr. **Davidson**. And David Stewart represents Judge Nixon.

The **Chairman**. Welcome, Mr. Stewart.

Mr. **Davidson**. As Senator Heflin indicated, the responsibility of the committee, under Impeachment Rule XI, is to receive and report evidence to the Senate without making a recommendation as to the question of guilt or acquittal.

When the Senate considered the question of whether to have a rule that would authorize the hearing of evidence before a committee, it did consider the question whether that committee should make a recommendation, and rejected that idea. So that when the matter goes to the Floor, it does not begin with the weight of a recommendation, either for guilt or acquittal.

However, the Senate, in the Hastings matter and in this matter, has added a further responsibility to the committee's role; and that is to submit a summary report of the evidence in addition to reporting the totality of the evidence. And that report would consist of a statement of uncontested facts, and a statement of the party's evidence on contested issues, to facilitate the members' review of the evidence when they receive the bulk of the evidence. And that was a reflection on experiences in the Claiborne proceeding, where some members did express an interest in having a road map through the evidence which would assist their review of that.

Of course, when the matter goes before the full Senate, each member of the committee is free and is undoubtedly looked to by other Members for a personal assessment of the evidence; but that would come from each member, and not from the committee as a body.

What the committee does do in a very important way is to shape the evidentiary proceeding, to rule on questions of evidence, to make determinations about relevance, describe the outer boundaries of the proceedings, what issues are relevant for the taking of evidence, and then to monitor those rules and require adherence to them in a consistent way through the proceedings.

I should tell you something about the Hastings schedule, and the request from the House. The Hastings matter is in pre-trial proceedings. In effect, pre-trial proceedings are somewhat new to impeachments, which probably in the past proceeded more rapidly to evidentiary hearings. But Judge Hastings did request, and the committee has granted, a number of pre-trial procedures on the discovery of evidence in the possession of the House, or of the Department of Justice, or of the Federal Bureau of Investigation, and also the committee which conducted the investigation for the Eleventh Circuit.

The House also has requested some pre-trial procedures, quite importantly, in the Hastings matter—a procedure by which the House is served on Judge Hastings initially proposed stipulations—they are now, in essence, request for admissions. And Judge Hastings has an obligation under a schedule that has been established to either admit certain matters, or indicate why those matters should not be admitted. And that is an effort to take out of the evidentiary phase certain matters about which there may be no contest as to the facts, and allow the committee and the parties to focus on contested issues during those hearings.

The pre-trial proceedings should be completed this month and next month; and evidentiary proceedings in the Hastings matter will begin on July 10, with the committee's expectation to complete its proceedings by the beginning of the August break; so, therefore, no later than about August 4.

Representative Brooks is the manager in both proceedings, and the House special counsel is special counsel in both proceedings. And so, it is the House's request—and I think it is compatible with Judge Nixon's hopes—that this committee determine to go after the Hastings proceedings, and hear evidence soon after Labor Day in the month of September.

One thing to be cognizant of in that schedule is that the Rules Committee, when it studied the whole question of procedures for the Hastings matter, expressed the very strong wish that committee proceedings be completed sufficiently in advance of Floor proceedings; so that the full membership have an adequate opportunity to consider the evidence that is reported to it.

One of the very great concerns in the Claiborne matter is that the committee's report was followed very quickly by the Floor proceedings, and may not have provided as much time as Members would have liked to study that record as completely as they may have wished. And so, the Rules Committee has strongly urged that evidentiary proceedings be completed and the matter reported in a way that allows sufficient time for the Senate to study the matter before it takes up the issue.

And that procedure, on the Senate Floor, could involve calling witnesses, involve doing it all on the Senate Floor, or hearing selected witnesses or witnesses that the committee did not hear. But if it occurs as it did in Claiborne, it would involve final arguments before the full Senate and then a period of closed deliberations prior to voting.

Judge Nixon's counsel has written to me, and there is a copy in front of each member, to assure the committee that no matter what may occur in terms of Judge Nixon's incarceration—he is presently incarcerated—there is a schedule where he will sometime soon move to a halfway house, I believe, or it is hoped by him. And he has a parole eligibility which, sometime in October or November, may lead to his release. He also has applications pending that may involve an earlier release.

But I understand his letter to be his commitment not to seek to resume Judicial duties until these impeachment proceedings are completed. And the letter was written, I think, to take out of question—in terms of the committee's scheduling—any possibility the judge may be released from prison and seek to resume Judicial duties immediately. He will abide by the Senate's procedures until completion of these proceedings.

The Hastings Impeachment Committee has authority from the Senate, as this committee does, to hire a staff. The Claiborne committee proceeded with existing Senate staff only. Partly that was facilitated by the fact that Senator Mathias, who chaired that committee, was also the chairman of the Committee on Rules and Administration, and made his staff available to this committee.

A small, very competent, I believe, administrative staff has been appointed by the Hastings committee. Tony Harvey is the committee administrator. From the Claiborne impeachment, you will remember Tony, who assisted in the administration of those proceedings; and Senator Bingaman, and I understand with Senator Specter's concurrence, are quite willing to have that core administrative staff serve both impeachment proceedings.

They have got an office, and are setting it up; and they are quite familiar with the administration of impeachments—Tony, from the Claiborne impeachment—and everything that they are now learning in the Hastings impeachment. And it would provide considerable economy to the Senate to be able to utilize that central staff. And that will be particularly facilitated by scheduling evidentiary hearings after, at least, the main Hastings hearings are completed in July.

The Hastings committee has also brought on two counsel. That also is different than occurred in Claiborne, and is a determination made by the complexity of those particular proceedings. That is a judgment that this committee will need to make, too, whether it should use existing Senate staff for that purpose, or whether it should supplement that staff in any way.

It need not be a decision that the committee makes immediately, because I think it does have time to consider the existing or the prior record in the House, and have a sense of the dimensions of these proceedings, and perhaps hear from counsel as to their views about issues in the case before making that further determination.

In front of you, we have placed the hearing record in the House, a large volume of House exhibits, House report, a pamphlet on Senate impeachment procedures. The House materials are, of course, not in the record before the Senate. But it is a record that was compiled with both parties in the House.

You will see that a substantial part of the appendix consists of Judge Nixon's exhibits; and Judge Nixon did testify before the House. And we thought, by making it available to you, that would facilitate your preliminary efforts to understand the dimensions of this case as it will be presented to you.

For both Judge Claiborne's and Judge Hastings procedures, the committees involved determined it would be useful to delegate central administrative responsibilities to the chairman and the vice chairman, to meet initially with counsel, to communicate with them about questions that counsel might need to raise prior to evidentiary hearings, to convene the committee if necessary—and it probably would be appropriate to consider some pre-trial matters—but to take the lead on behalf of the committee.

Under the Impeachment Rules, in fact, the chairman has considerable powers to establish the forms of the proceedings; and in the nature of these proceedings in both Claiborne and Hastings, that has been done in consultation with the vice chairman, working together.

And it could very well be that, as in the other proceedings, the chairman and the vice chairman would likely communicate with counsel, and have them submit by a certain date their views about whatever procedures should take place within the next month or two in preparation for the hearings at a date that the committee will designate.

I think that is basically the message I would like to communicate at this time, with perhaps only this other point. Both in Claiborne and in Hastings—and of course, this committee is free to determine its own procedures—but to the extent that it chooses to be guided by determinations made in those proceedings, both committees considered the question whether any particular set of evidentiary rules govern proceedings before the committee.

Quite explicitly, in the Hastings proceeding, but also, in fact, in the Claiborne proceeding, the committee and the committees have determined that the Senate sits both as a jury and a judge. Rules of evidence which are designed to protect the jury from unreliable evidence are not necessarily the only guides that the committee should look to; and they certainly look to Federal Rules of Evidence, or the common law generally, to consider whether those principles are helpful principles to the committee.

But basically, the committee might serve the Senate best by receiving evidence which it determines to be reliable and relevant, and leaving to the Members of the Senate determination of what weight to give to the evidence, depending upon its quality. That is not to conduct proceedings which are rigidly bound by any prescribed code, although perhaps guided by established rules for the information of the committee.

The Hastings committee made that determination explicitly in an order, after having been asked by the parties what its views on the Federal Rules of Evidence would be.

The **CHAIRMAN**. Senator Hatch?

The **VICE CHAIRMAN**. Well, I think he has explained it pretty well. Basically, we just need to get our feet on the ground, work with the administrative committee, start setting these things up.

It is open for us whether we decide to have additional committee staff, other than the administrative staff?

Mr. **DAVIDSON**. That is correct. The resolution contains a paragraph which authorizes actual necessary expenses, including the employment of staff. The leadership did ask the Hastings committee, and the Hastings committee leadership did pledge to the leadership of the Senate, that the staffing of that committee would be as modest as possible. And I think that is the leadership's hope. But there is flexibility under the resolution to hire.

The **VICE CHAIRMAN**. I suspect we will have to hire some staff; but I agree, it should be as modest as possible.

The **CHAIRMAN**. The Senator from Alabama.

Senator **HEFLIN**. Mr. Chairman, as I recall, we had, at the first meeting in the Claiborne matter, we adopted a rather broad and general authorization resolution, authorizing the chairman and the vice chairman, acting together as a team, to look into staff, other housekeeping measures, and to proceed—and that they would report back. And I think that what we did is, we confirmed their action.

My memory is a little hazy on that. But as I recall, these matters pertaining to staffing, that sort of thing, whether or not special counsel and other things were delegated to the chairman and the vice chairman; and I do not know whether there is any prepared resolution or not. You do not have one?

Mr. **DAVIDSON**. As a matter of fact, I think you moved it last time just about in those words.

Senator **HEFLIN**. Well, I would move that we authorize the chairman and the vice chairman, acting together, to handle all housekeeping matters, including the questions of staff, special counsel, or any other matter that would be necessary to get the committee started; and that they be given large plenary powers relative to this to report back in the Senate and confirm that report.

Mr. **DAVIDSON**. And, in keeping with the other proceedings, that authority, I would think, should include communications to counsel in establishing early dates for submissions by counsel as to suggested procedures.

Senator **REID**. Second.

The **CHAIRMAN**. Seconded by the Senator from Nevada.

Mr. Chafee? Any discussion?

Senator **Chafee**. Briefly. I am not interested in the personnel of the staff; but I would like to, before you go ahead and hire somebody, I, for one, would like it if you would come forward with your general plan; that we could then say it is too ambitious or too frugal, or at least have a chance to comment on it before you embark.

I think it would be nice if you could take whatever time you needed to outline what you propose to do; and then, with the rough estimate of the expenses involved, then come back and submit it to us, and we will have a vote on that.

Senator **Heflin**. I am willing to accept the Chafee amendment.

The **Chairman**. Well, I can assure the Senator, in my role as chairman, and consulting with the vice chairman, that we will proceed along that line, whether we have precise authority or not. I think that is the way we ought to proceed; and we will do it.

Senator **Murkowski**. Mr. Chairman?

The **Chairman**. The Senator from Alaska.

Senator **Murkowski**. I have one other point, if I might. If that subject is complete, I just wanted to get back to the original———

The **Chairman**. Without objection, we adopt the recommendation of the Senator from Alabama. Go ahead.

Senator **Murkowski**. I would hope that, as I understood your outline—and I may have missed something—it more or less was that we will follow along behind the Claiborne case, and for the floor presentation and so forth; am I correct in that?

Mr. **Davidson**. Well, I do not know. As to the Floor, I would imagine that the leadership would need to make a determination, if both matters were ready by sometime late September, as to which it may call up first. The limit of my suggestion was that the committee consider having its hearing following the Hastings matter, in deference to the House request that Representative Brooks, as a manager in both, and special counsel be able to concentrate on the Hastings matter, which did come over earlier, and then have their Nixon proceedings after that in the month of September.

Senator **Chafee**. Well, obviously, we have got to consider the House situation, although I do not know whether Mr. Brooks is personally involved in each of these cases. I, for one, would like us to move ahead as quickly as we can; because as we all know, things are rather slack in the Senate right now. And they are going to get busier.

And I would hope that we could do as much on this case as soon as possible, because we are going to be tied up with reconciliation in the Finance Committee and in the Environment Committee; and all the committees are going to be busier and busier as we go along.

And so, I, for one, would opt to get going on this as soon as possible and as fast as possible. It may be that we have tag along behind with the fuller action; but that is out of our control.

The **Chairman**. The Senator from Nevada.

Senator **Reid**. It is my understanding, and I only know what I read in the newspaper, that Judge Nixon is still drawing a salary.

Mr. **Davidson**. That is right, as a life-tenure judge until removed.

Senator Reid. Then I support wholeheartedly Senator Chafee's statement. ~~I think~~ that we should wait for nothing; because this is taxpayer's money, and we have been through that once before, where a judge was drawing money after having been convicted of a felony. And I think that we should not wait.

The House Judiciary Committee has 50 members, approximately, in it; and I think they can find somebody to handle the case.

Senator Heflin. It is true of Judge Hastings, too.

Senator Reid. I just think we should move forward on it.

Senator Hatch. Well, Mr. Chairman, if I could just comment.

It takes a good month to get just the administrative and other things out of the way, and then probably another little bit of a period of time to get going. So, you are talking about being, approximately after the Hastings thing, so it is—but I agree. We ought to move with expedition.

Senator Reid. The point I am making, I think it is the same one that Senator Chafee is making, that I do not think we should, with the responsibility that we have been given, that we should wait until they finish. The Hastings thing, if it runs the course that has been set previously, it is going to be around for a long time. I think we should go ahead and do our job and let the Hastings matter stand on its own merit.

Senator Danforth. Mr. Chairman.

The Chairman. Mr. Hines.

Senator Danforth. Well, I would like to ask both counsel how much time it would take them to prepare. It would seem to me that having gone through this in the House, counsel should be in pretty good shape.

Mr. Davidson. Their estimate today is 10 to 14 days, I think.

The Chairman. Ten to 14 days of what?

Senator Hatch. You are talking about trial days, right?

Mr. Davidson. Yes.

Senator Hatch. But what about preparation before trial?

The Chairman. I think the question embraces that, too.

Mr. Davidson. Well, you could hear from them directly.

The Chairman. Mr. Stewart, we will be glad to hear from you. Why do you not come to the table so we can hear you. Mr. Stewart, the counsel for Judge Nixon.

Mr. Stewart. Thank you, Mr. Chairman.

It is difficult to estimate because there are two uncertainties, as far as I am concerned. One is that there is a great amount of information in terms of grand jury records and investigative files which have been provided to Judge Hastings in preparation for his hearing, which I have not had access to.

I do not know the volume of it. I met with Mr. Baron this morning and discussed it. I need to review those materials and that would take some time.

The stipulation process, which has been predicted, would take some time, and in addition, we do anticipate presenting a motion to dismiss the third Article of Impeachment, an article which we think is invalid as a matter of law. The committee will have to determine how it wishes to deal with that. That, we anticipate, will take some time. It is very difficult to put parameters on this.

Senator **Danforth**. I would hope, Mr. Chairman, along with Senator Chafee and Senator Reid that insofar as possible, our schedule would be driven by the readiness of counsel to go forward, and it would seem to me that as far as the House is concerned, surely they could work on both matters at the same time, it would seem to me. There are many members of the House Judiciary Committee. I do not think they all have to be present, do they?

The **Chairman**. Well, we will look into it.

Senator **Danforth**. And Senator Chafee is absolutely right. This really is a slack time, as the beginning of Congress often are. This may be more than usual, but it is not going to last. And all of us know that the intensity of work, particularly with reconciliation, is going to get much greater as we go on with the year. So, my hope would be that if it is possible to proceed at an early date, we might do that.

The **Chairman**. Well, let me respond to the comments all very quickly. In my role, I want us to move as credibly, judiciously, and expeditiously as possible. I agree with everything that has been said. I make one assumption and that is that all of us on this panel are here because we accept this responsibility.

We could have refused to accept it. And I make that assumption because if, when Senator Hatch and I get together, based on your direction, to try to review past procedures and make recommendations to you on the procedures that we will follow, we will consult with each of you as to your schedules and time. But I am hoping that it will not take us—it may—but I am hoping it will not take us a month to get started.

With the cooperation, of course, it is going to take the cooperation of the full committee, especially if we hear the kind of time that is being requested in order to meet our obligations in thoroughness and fairness. But based on the direction of the Committee, in response to the observations—and I think we are all together—we know we have got to do the job. We know it has got to be done thoroughly, but I think the sooner we get together and agree on the procedures and move to begin, the better off we are all going to be.

The Senator from Alaska.

Senator **Murkowski**. Thank you, Mr. Chairman.

In view of the commitments that we recognize we are going to have, I wonder if there is not a more expeditious manner to keep us informed of the staff's progress without having our own individual assignees from our office spending an awful lot of time just updating us as to where we are. And I am certainly not going to have time to sit down and read verbatim all aspects that have transpired to date.

However, diligence, as well as the responsibility, mandates that we be aware on the basis of the continuing material that is provided. And I wonder if there is not some way of reporting this in a bullet-type manner as opposed to the conventional legal structure that oftentimes two or three pages will go by before you get to the point.

I do not mean to be facetious, but just from the standpoint of an outline so that one could sit down in a half-hour, more or less review what the staff has done, as opposed to being thrown a hearing book and then having a staff member to ask.

The CHAIRMAN. Senator Hatch.

Senator HATCH. I think each of us has to assign a member of our staff to this, depending upon what we do with regard to additional staffing. And I think we can keep them fully informed and up to date in every way, rather than trying to put out a memorandum every week or every month on it. In fact, I think from the judicious standpoint, it is probably better for us not to put out a lot in writing other than what we hear and what we finally decide is the report from this committee. But we can certainly keep your staff—we will certainly have regular meetings and keep——

Senator MURKOWSKI. Well, what concerns me, Senator, is if each individual staff person drafts up his own analysis, some kind of an effort of where we are, then we are going to spend an awful lot of time just discussing that among ourselves.

Senator HATCH. Sure.

Senator MURKOWSKI. But if there could be, prior to our meetings, just a short staff update outline, that is what I am talking about.

Senator HATCH. Why don't we just see if we can figure out some way of doing that so it is done, so everybody is kept informed all the time.

The CHAIRMAN. The Senator from Colorado.

Senator WIRTH. Thank you, Mr. Chairman.

I missed the answer to the question, I believe asked by Senator Danforth, as to how long it would take the staff to get this thing ready to go. Is that 10 days of hearings after it is ready? Or how long will it take to get us going?

Mr. DAVIDSON. Maybe if both Mr. Baron and Mr. Stewart came up they could respond to each other.

The CHAIRMAN. Mr. Baron, the House counsel.

Mr. BARON. Mr. Stewart and I conferred earlier today, and we tried to estimate. That figure of 10 to 14 trial days was trial days, as distinguished from pre-trial workup, discovery, and all the things that Mr. Stewart was referring to. That is the period that we are actually talking about, the committee taking evidence.

With regard to the pre-trial stage of this discovery—motions to dismiss a particular article, motion in limine which might be filed by the House, stipulations which might be proposed by both sides—there is no reason why that process cannot be ongoing really right from the start. Mr. Stewart and I were talking today about how we get that under way.

That phase of it, I do not think it is really in issue. And I think Mr. Davidson will bear me out that the House certainly in the Hastings thing has responded on a timely basis as schedules have been set by the committee. And we would intend to do so here.

To some extent, we are reacting to motions which will be filed on behalf of Judge Nixon. So when you set a schedule when those motions are going to be filed, Judge Nixon's counsel will live with that, and we will live with the response time.

Senator DANFORTH. Excuse me, Mr. Chairman.

You are also involved in the Hastings matter?

Mr. BARON. That is correct.

The CHAIRMAN. The one thing I want to make sure, first of all as we begin, between the vice chairman and myself in order to have these discussions about staffing as well as timing, and to make the recommendation to the full committee that there is—if we are using the same staff, if we are using the staff of the Hastings matter for this matter, I am going to insist on the utmost assurances that there will be no delay in the proceeding with this matter if we are using the same staff for both matters.

Can you give me that assurance now?

Mr. BARON. Well, I am not sure—you are using the same staff that the Rule XI committee has retained in the Hastings matter?

The CHAIRMAN. Yes. If we are going to use the same staff to proceed on this matter.

Mr. BARON. Right.

The CHAIRMAN. That is currently being used to pursue the Hastings matter, that there is no delay of the Nixon matter automatically involved because the staff is working on the Hastings matter.

Mr. BARON. Well, that certainly would not be at our side. I mean, we have a separate staff on the House side for Nixon, a separate staff for Hastings. So we will turn out the work on a timely basis and will live with whatever schedule this committee sets.

I guess it really turns on whether your staffing is adequate to handle the flow of material that will be coming in and on which you want to have their views.

The CHAIRMAN. I will pursue that, then, and we will get that clear with Mr. Davidson.

Mr. DAVIDSON. One consideration as the committee organizes itself is that this kind of proceeding differs from ordinary congressional investigations, where the Senate is an active investigator, puts together a staff to go out and find witnesses to bring them here, to prepare lines of examination. This proceeding is an adversary proceeding in which the House will bring witnesses to the Senate and examine them, and they will be cross-examined by Judge Nixon's counsel. And Judge Nixon's counsel will produce witnesses, and they will be examined and cross-examined.

The staff role administratively is to organize the flow of paper but not substantively to investigate because that is the burden of the parties. And there is even a considerably reduced burden on members to prepare their own examination of witnesses. Members' examinations can be quite interstitial, filling in the blanks in the examination by the parties, and need not be complete examinations as might occur in—or did occur in Iran-contra, for example. So I think it does require a very different level of staff than other Senate undertakings.

The CHAIRMAN. Is the date, Mr. Davidson, of July 10th that you proposed for our consideration, that is for the actual trial itself?

Mr. DAVIDSON. The July 10th date is the date that the Hastings committee has ordered the parties to begin in the Hastings matter, going through the month of July and ending at the latest early August.

The CHAIRMAN. That has nothing to do with us.

Mr. DAVIDSON. That was only to advise you of when the Hastings proceeding occurred.

Senator HATCH. Mr. Chairman, I think what he said is that they would like to proceed with Hastings in July, and that it is going to be very difficult to run simultaneous trials. And we would begin some time in September. Now, that puts a tremendous burden on us because September is a very busy month. It may be better for us to go in July, too, if we are capable of doing so and if we are ready to go and if counsel are prepared to go. And I think that is just something we have to go through and try——

The CHAIRMAN. Let us ask Mr. Stewart that. Any reason that we could not proceed with working backwards with having this matter actually tried those 10 to 14 days you were talking about in the middle of July?

Mr. STEWART. I cannot tell you for sure, but I can lay out for you the parameters that lead me to not be certain that we can. This matter will not formally be joined. I have to answer by May 31st. The House then responds to my answers by June 10th. We have to get into discovery. The Hastings matter has involved tens of thousands of pages of material. I do not know if it is that much. I asked Mr. Baron that this morning, and he said he thought it was less. But I think it will be a great large amount of paper that will need to be reviewed, grand jury records, and I need a fair opportunity to review those. The stipulation process cannot take place instantaneously. It does require—under the rules, as used in the Hastings matter, the stipulations are binding if they are not reasonably and adequately denied. So I have to be very careful with those. And so will Mr. Baron if I propose stipulations to him.

By the same token, we also have the problem of the motion to dismiss, which is a separate legal matter, and this committee is going to have to determine if it wishes to resolve that itself in some manner or to take it to the floor. I do not know how to deal with that at this point. I know with Judge Hastings it was taken to the floor.

Senator REID. Mr. Chairman?

The CHAIRMAN. The Senator from Nevada.

Senator REID. I still want to say this: I know that the chairman and vice chairman will be as solicitous and as fair to counsel for Judge Nixon as they can be. But I want to go back to what I said earlier. Judge Nixon is drawing a salary during this period of time, and I think we have to keep that in mind. He has got a stipulation here saying that we can stall this as long as we want; he will not go back on the bench. But I think this letter should say, "You will not go on the bench, and you will not draw a salary." Then we can take a lot of time.

I would be happy to be as patient as possible, but until that provision is in the letter, I am going to use whatever influence I have to speed these proceedings along, because I think it is unfair that he is drawing a salary while he is serving time in prison.

Senator HATCH. Well, Mr. Chairman, I think we all agree that we ought to move with dispatch. I think what we need to do is you and I need to get together with Mr. Davidson and with counsel and just see where we go from here, and just try and move it as quickly as we can in the most expeditious good way that we can, and to obtain staff and to make sure that he gets whatever materials he is entitled to as soon as possible so that you can then give us an estimate of how much time you are going to need, in fairness, and then make a decision where we are going to go.

Senator DANFORTH. Mr. Chairman?

The CHAIRMAN. The Senator from Missouri.

Senator DANFORTH. Obviously, we want Judge Nixon to be treated fairly and to have every opportunity to present his case. On the other hand, I must say that here is a record that already exists. This has been before the Judiciary Committee, the House, before the House of Representatives. It has been a matter that has been involved in a criminal trial. In effect, this has been tried twice before.

I must say that the comments of the attorneys are very distressing and troubling. It is difficult for me to imagine that there is at this point a long process of discovery which must now ensue, followed by 10 to 14 days of trial. Clearly, the counsel can narrow the issues better than that. Your job is not to wear us out but, rather, to present to us the evidence that should be before the Senate.

So I would hope that—you have had a meeting already today. Maybe you could meet again. Maybe all three of you can meet and try to figure out how you can put the case together in a way that is fair and orderly, but in a way that is not just work for the sake of work.

Senator HEFLIN. Mr. Chairman?

The CHAIRMAN. The Senator from Alabama.

Senator HEFLIN. On the basic rules of evidence, matters that are spoken in the presence of the defendant, and he has his opportunity to reply to those statements, would be normally admissible. And I think the entire proceedings in the trial court, I think that under the rules of evidence that the proceedings of the trial court can be made a part of the record. Now, you might get into some distinctions here and there, but under liberalized rules, as the person said—and I think if the proceedings in the trial court are made a part of the record, it would expedite the hearings substantially.

Senator DANFORTH. Is it not true, Mr. Chairman, that the essence of this case is that Judge Nixon is alleged to have perjured himself by making certain specific statements, and that those statements are either true or false? Isn't that the case before us?

If that is the case before us, why is that not a very narrow issue? He is alleged to have said things—those statements are on the record. We can read those now. We do not have to have lengthy discovery. Those are the allegations that are before us, and Judge Nixon claims that that is true or not true. Aren't those extremely narrow issues?

What is this business about lengthy discovery and 10 to 14 days of a trial? Do you mean 10 to 14 complete days, 9:00 to 5:00 days that you want us to plow through whether or not you spoke the truth in these specific areas?

Mr. STEWART. Mr. Chairman, do you wish me to respond?

The CHAIRMAN. Please.

Mr. STEWART. If I may, there are some very serious issues here. One of the key trial witnesses has recanted his testimony. He said he lied at trial because of pressure that was placed on him by the Government. That witness and the way he was dealt with by the Government is a central issue in an appeal that is going up to the

Fifth Circuit. It will be argued on June 5th. Those issues require discovery.

There is another witness whose credibility is extremely flawed. He was the other witness against Judge Nixon. We need to get into the discovery with respect to that.

The conduct of this investigation was lamentable at best. That is going to be a central issue of our defense. Mr. Chairman and Senators, under the criminal rules of procedure, I have not got most of that stuff. We are hopeful that in this proceeding we will get a fair hearing; that we will get a chance to hear that stuff; that the Constitution requires that that kind of fairness and judiciousness be applied here to give Judge Nixon a chance to make his case. He did not have that chance at the trial.

Senator DANFORTH. Well, we believe in fairness, counsel, but I am sure many times in the practice of law you have had judges say to you: Is all this necessary?

Mr. STEWART. Yes, sir.

Senator DANFORTH. I mean, it is commonplace, isn't it, in trying a lawsuit that judges do not just sit there for countless days on end as counsel flounder around the courtroom, taking their good sweet time in presenting the case. That is exactly our point. Ten to 14 days is an extreme length of time, and every representation that has been made to this Senator is that this is a simple and straightforward case. Now, you are saying that we are going to get off into the hinterlands and hearing all kinds of evidence about the veracity of this witness or not. Fine. But my hope is that you could at least attempt to narrow the issues insofar as possible, not present redundant evidence, narrow the issues as much as you can by admissions or by requests for admissions and stipulations, and try to work it out so that this is not an effort to drag it out any longer than absolutely necessary.

Mr. STEWART. Certainly, Senator, the purpose of the discovery exercise is to narrow the issues, precisely. And I would hope that the 10- to 14-day estimate is high. Counsel are cautious on estimates of time. In addition, we do not know about interruptions for the committee to do its business, the Senators to do their business. So it is a difficult thing to estimate.

But I do think that the procedures—we are not talking about very onerous or long-term procedures, and we are very cognizant of the desire to narrow the case and to present the issues that are really disputed. And on a personal note, I do not propose to flounder around here, and I hope I do not.

Senator HATCH. Mr. Chairman, one last comment and then I think we ought to let the chairman and me go about trying to get this thing put together and then approved by the members of the committee.

This is a very important proceeding. It is a constitutional proceeding. It involves a judge, a Federal judge. It involves fairness; it involves dignity; it involves a whole raft of other constitutional implications. And it does take time.

I want to move it as quickly as possible. I know the chairman will want to move it and everybody on this committee, and we will. And we will not brook any delays or any slow-downs or any difficult times. It is like a court would handle a case as well. But we also want to protect the rights of this judge to the utmost extent under the Constitution.

Like I say, I do not think it is all that simple a case, from what little I know about it at the present time and what little I have read about it. And I am not sure that it should not have the very important constitutional consideration that these matters are supposed to have.

Now, all of us are coming to the conclusion, I think, that this is a system that is a very difficult one to operate. And it may be that we have got to change this system in the Constitution. But, for now, we are going to proceed, and I hope your estimate of 14 days is high, too. I think it probably is, because I think it is going to come down to just a few salient things, anyway, and it may be that you will make more headway by hitting those salient points rather than delaying it or dragging it out or taking time to go through every detail that you may feel you should.

The **Chairman**. Gentlemen, I have a special obligation which you have given me which I will seek to fulfill. But I think Senator Heinz said it very well. I was reflecting on those matters before he made his statement. I am not prepared at this juncture—I have not reviewed the United States Constitution as to what our responsibilities are, and I will immediately.

I know that we tend to have these matters before, like the Claiborne. Everybody assumes that if we have done it that way once we are going to do it that way again. I do not make that assumption. The fact that we have 2,000 pages here of the hearings on the public record, with counsel constitutionally protecting the rights of Judge Nixon, plus a trial that has resulted in a conviction, I echo—and it is an echo. I have nothing really to add to what Senator Heinz has said. There is a—I am sorry. Senator Danforth.

There is a way to narrow these issues. I refuse to make any concession at this stage, and I say it that strongly in order to urge counsel and Mr. Davidson to get together. I refuse to concede that issues in this matter cannot be narrowed in order to thoroughly protect Judge Nixon's constitutional rights, and yet not have a full trial in the sense of the external proceeding under our legal system, which is not required under the Constitution in this proceeding.

Now, I know the lawyers here are probably going to ask us to adopt all the rules of civil procedure because that is what you are used to doing. But we have non-lawyers on this panel, and the issues are going to have to be framed so that those who are not lawyers understand what they are being asked to decide. And we are going to do everything we can—I certainly am—to make sure that all rights under our legal system are protected.

But I want to add my voice to that of Senator Danforth and others that this is not to retry the case in Mississippi. That is not the constitutional imperative. I add that because counsel has already said that you think there was some injustice done there, and I understand that. But we are going to do everything we can meeting here in this committee to have a procedure that is going to try to narrow this thing into a reasonable time frame.

I just cannot believe if the issues are as such that the records cannot be adopted, stipulations cannot be made based on the record that has already been made, and then the issues narrowed so there can be real production of witnesses, cross-examination, all those constitutionally protected guarantees, but it be done in a reasonable amount of time, meaning three or four days. I want you to work from three or four days, rather than 14 days backwards.

I am thinking out loud now even though I know it is on the record. We are all going to agree, and this committee is going to fully adopt the procedures. But there is no reason under law or justice, after what has already been done, for us to look at this thing as a four- or five-month, with maximum discoveries under Federal Rules of Civil Procedure, and maximum times for subpoenas under Federal Rules of Civil Procedure.

You know, counsel, as well as I do, all of that can be expedited because this matter is so important. We will make sure we do our best to wave our side, get our people ready, but we need your help on this. And it is all to Judge Nixon's ultimate benefit that we not look at it by seeing how many pounds of documents we can produce in this most vital thing for him.

We stand adjourned subject to the call of the Chair.

[Whereupon, at 5:10 p.m., the committee was adjourned, subject to the call of the Chair.]

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May 19, 1989

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Dear Mr. Baron and Mr. Stewart:

I thought that it might be helpful to set forth in a letter the dates which we discussed in separate conversations earlier today concerning pretrial procedures for Judge Nixon's impeachment trial. It is possible that some of these dates might be revised after the Senate returns from its Memorial Day recess, but I think that the prudent course is to assume that the schedule will be as follows:

1.	Filing and service by each party of pretrial motions, including proposed stipulations	June 12
2.	Filing and service of responses	June 19
3.	Argument before the committee of pretrial motions	June 22, at 10:00 a.m.
4.	Filing and service of pretrial statements	July 10

Each party's pretrial statement should include (a) a list of the party's proposed witnesses; (b) a brief statement of each witness's proposed testimony; (c) the exhibits that each side proposes to offer; and (d) a statement of the legal principles that each party believes is applicable to each article of impeachment. Although the committee will not reach conclusions about the legal sufficiency of the articles, it will be important for the committee, in determining the relevancy of evidence, to know from the parties the legal theories upon which each is proceeding.

Please call if you have any questions.

Sincerely,

Michael Davidson

Michael Davidson

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RECEIVED MAY 24 1989

May 24, 1989

By HAND

Sen. Wyche Fowler, Chairman
Sen. Orrin Hatch, Vice-Chairman
Committee Considering Impeachment of
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SR 204
Senate Russell Office Building
Washington, D.C. 20510-1003

Dear Senators Fowler and Hatch:

I write on behalf of Judge Nixon to address several matters relating to the pending impeachment proceeding. As you both noted at the organizational meeting on May 16, the gravity of this constitutional proceeding requires careful attention to the rights of Judge Nixon and the integrity of the impeachment process itself. We are very concerned that the current proposed schedule will deny Judge Nixon a fair opportunity to present his case to the Senate, and will deprive the Senate of the sort of compact yet complete presentation to which we all aspire.

I. The Senate Must Conduct A Full And Fair Hearing In This Case

A. The Constitution Requires A Full Senate Hearing, As The Senate And House Managers Have Acknowledged

The Constitution grants the Senate, following a trial, the sole power to remove a federal judge from office for "high crimes and misdemeanors." Although impeachment by the Senate is a burdensome process, the Founders selected it in large part because it is burdensome, in order to ensure the independence of the judicial branch. As Sen. Daniel Evans said during the Claiborne impeachment, "The trial of an impeachment is no place for shortcuts or haste. Justice may be elusive, but that is no excuse for a half-hearted try to find it." 132 Cong. Rec. 516822 (Oct. 16, 1986) (daily ed.).

In this case, the Senate must approach the facts fresh, with no preconceptions based on Judge Nixon's conviction in a trial that was infected by false testimony and distorted by prosecutorial abuses. In the Claiborne case, the Senate refused to convict based on Judge Claiborne's prior conviction alone, clearly announcing the Senate's view that it has a constitutional duty to reach its own independent verdict based on a full review of the facts. *See* 132 Cong. Rec. S 16241 (Oct. 14, 1986) (Sen. McConnell); *id*. S 15874 (Oct. 10, 1986) (Sen. Matsunaga); *id*., S 15763 (Oct. 9, 1986) (Sen. Hatch); *id*., S 15767 (Sen. Specter). Similarly, the Senate has refused to dismiss the charges against Judge

Hastings based on his acquittals, insisting on conducting its own evidentiary hearing. The same principle that denies Judge Hastings any advantage in the Senate because of his acquittals, requires that Judge Nixon not be penalized based on his conviction.

On this point, we join the statement of the House Managers in the Hastings proceeding: "In both a legal and constitutional sense, the jury verdict is irrelevant to your decision regarding what procedures to recommend and to your ultimate decision whether to convict Judge Hastings on any of the Articles of Impeachment."

B. The Need For Full Senate Review Is Heightened In This Case

Specific features of this case increase the need for the Senate to conduct a full and fair evidentiary proceeding. Because the allegations against Judge Nixon concern the truthfulness of his grand jury testimony and other statements, the Senate's verdict must turn upon its estimate of the credibility of the witnesses. Such credibility determinations cannot be based upon review of a cold transcript, but require the hearing of live testimony during which the senators may take the full measure of the witnesses.

This need is heightened because of the checkered performance of the two major witnesses against Judge Nixon.

Bud Holmes, the former District Attorney of Forrest County, Mississippi, was indicted on five counts of perjury and pled guilty to contempt of court in the form of making false statements to the grand jury. Holmes has admitted that he indicted Drew Fairchild in 1981 in order to pressure Drew to pay legal fees to Bill Porter, Holmes' good friend. In House testimony last July, Holmes repudiated a sworn affidavit he had signed four months earlier, and also repudiated sworn deposition testimony he gave in a civil lawsuit against him in 1987.

Wily Fairchild, Drew Fairchild's father, was the other major witness against Judge Nixon. He has admitted giving false testimony at Judge Nixon's trial in order to please the prosecution, which had made several concealed promises to assist both Wiley and his son, Drew. These matters will be argued on June 5 before the U.S. Court of Appeals for the Fifth Circuit, as part of Judge Nixon's effort to win a new trial.

The need for a full and fair evidentiary hearing is further heightened by Wiley Fairchild's recantation and the newly discovered evidence of secret government inducements to the witnesses against Judge Nixon. This point can be illustrated by comparing this case to the Hastings impeachment proceeding. In *Hastings*, the House Managers have argued that the jury's acquittal on criminal charges is irrelevant because that acquittal was secured through false testimony and false evidence. The Senate has voted to allow the impeachment to proceed on that theory. In contrast, the conviction of Judge Nixon was secured through the use of false testimony and through the suppression of exculpatory evidence that Judge Nixon had a right to use. Just as the House Managers are being permitted a full opportunity to prove their case against Judge Hastings, we are entitled to a full opportunity to defend the allegations against Judge Nixon.

Finally, the documentary materials so far placed before this Committee by the House Managers are seriously incomplete and one-sided. The House volume of exhibits, "Judge Walter L. Nixon, Jr., Impeachment Inquiry, Appendix I," Serial No. 96, omits a number of items that we submitted, and which Chairman Edwards stated at a hearing on March 2, 1989 would be included in the record (p. 128 of hearing transcript), including the following:

July 27, 1988,	Letter from David Overlock Stewart with attached Justice Department document dated March 22, 1985;
August 5, 1988,	Letter from David Overlock Stewart with attached Affidavit of John D. Baltar dated August 3, 1988;
September 1, 1988,	Letter from David Overlock Stewart enclosing materials produced during post-conviction hearing in Jackson, Mississippi:

(A) Two newspaper articles

(B) Prosecutor Reid Weingarten's notes, including outline of testimony given to Wiley Fairchild

(C) Wiley Fairchild's second script for testimony, prepared at the direction of the prosecutor

(D) Newspaper article "High court halts disbarment proceedings against Judge Nixon"

September 6, 1988,	Supplemental Post-Hearing Memorandum (responding to specific questions raised by Impeachment counsel in letter dated August 15, 1988);
August 30 & 31, 1988	Transcript of hearing on Judge Nixon's Motion to Vacate his convictions (This transcript is of particular significance because it includes Wiley Fairchild's recantation and much of the evidence of prosecutorial overreaching and abuses, which are matters that we were unable to explore during House hearings.)

In addition to these omissions, the House exhibit volume includes selective and one-sided excerpts of Judge Nixon's trial record. The direct examinations of Bud Holmes, Wiley Fairchild and several other government witnesses are included, but their cross-examinations by Judge Nixon's counsel are largely omitted. Indeed, a Senator reviewing only the materials prepared by the House Managers would have no idea that Wiley Fairchild has admitted that, following several undisclosed arrangements with the prosecutors, he gave false testimony at Judge Nixon's trial. As advocates, the House Managers surely are entitled to argue only their side of the case; but their one-sided advocacy must be recognized as such by the Senate, and Judge Nixon must have a full opportunity to present all of the relevant evidence.

C. The Full Senate Must Hear This Case

Until 1986, the full Senate heard the evidence in all impeachment trials. In Claiborne, the testimony was heard by a committee of twelve senators, like this committee, and the remaining 88 senators witnessed no live testimony. That procedure, tempting though it may be as a matter of convenience, violates the Constitution and derogates the independence of the judiciary.

The inadequacy of committee hearings in impeachment cases was explained by several senators during the Claiborne debate. As Sen. Levin stated (132 Cong. Rec. S 16823 (Oct. 16, 1986) (daily ed.)):

> [I]t was not adequate to let the Senate make findings in those disputed areas where witnesses demeanor or credibility is critical to the process of determining what the facts are. The Senate, as a finder of fact, did not hear or see a single witness. And, as a result, our ability to fairly reach decisions, when the facts were in dispute, was restricted.

* * * *

> When we voted not to hear any additional witnesses, we set up a process which made it impossible for the Senate, as the finder of fact, to fully and fairly evaluate the credibility of witnesses.

Sen. Bingaman complained that the full Senate, without hearing the witnesses, could not make an independent determination of Judge Claiborne's state-of-mind concerning the allegations against him (id,. S 15762 (Sen. Bingaman)):

> To make that type of independent determination of his state of mind, I believe it would be essential to hear witnesses and judge the credibility of those witnesses. For the Senate to convict . . . , the Senate must conduct itself as a factfinding body and cannot delegate that responsibility to a special committee. In my opinion, putting the record of evidence presented to the committee into the possession of all Senators is not an adequate substitute for Senators hearing the witnesses present their case.

There is no other fact-finding proceeding in our system of justice in which Judge Nixon could be compelled to submit his case to jurors who do not hear the evidence. If Judge Nixon were injured walking on the sidewalk, he would be entitled to a jury trial claim against the landowner, and the jurors would have to attend the trial and hear the witnesses. Indeed, if a juror were absent from that civil trial, the trial could not proceed unless the parties agreed to abandon their right to a full jury.

It makes no sense for one of the gravest proceedings in our polity -- impeachment by the Senate -- to be the only proceeding decided by jurors who have not heard the testimony of the witnesses. The Constitution states that the Senate has the "sole power" to "try all Impeachments.". The Constitution says nothing about impeachment by a committee of one-eighth of the members of the Senate, nor does it justify findings of fact by jurors who have no idea how the witnesses look or speak. Under the Constitution, the trial must be by the full Senate.

II. The Current Schedule For This Proceeding Is Unrealistic And Unworkable

In Mr. Davidson's letter dated May 19, 1989, we have been advised that the Committee has adopted the following pretrial schedule:

May 31 -	Judge Nixon's answer to the Impeachment Articles
June 12 -	Replication by the House of Representatives
June 12 -	All motions due from both parties
June 19 -	Response to motions due from both parties
June 22 -	Argument before the Committee on the motions
July 10	Submission of pre-trial statements, including a witness list, exhibits, and

statement of all applicable legal principles.

There are several serious problems with this schedule. After outlining these problems, we would like to propose an modest revision of this schedule that would allow effective preparation by the parties and a narrowing and framing of the issues for trial.

A. The Problems Of The Current Schedule

We are currently completing our appeal to the Fifth Circuit on Judge Nixon's motion for a new trial. Our final brief is due on May 31 and oral argument will be held in New Orleans on June 5. Consequently, between now and June 5 we will not be able to do any significant work on the impeachment beyond drafting this letter and preparing our Answer to the Impeachment Articles, which is due on May 31. [1]

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[1] Ironically, one of the issues we now must address before the Fifth Circuit was created by the House Managers. Following Wiley Fairchild's recantation last August, the House Impeachment staff faced the unraveling of the case which they had been hired to prosecute. To attempt to patch up their case, they took a further statement from Wiley Fairchild last December, which was kept secret from Judge Nixon. During that statement, Impeachment Counsel staff tried to lead Fairchild to recant his recantation; although Fairchild expressed confusion over all of the facts of the case, he still insisted that his trial testimony was false. A few days before the government's brief was due in the Fifth Circuit, the House Managers suddenly decided that this secret, ex parte statement should be released to the government and Judge Nixon. Incredibly, the government has submitted this extra-record material to the Fifth Circuit in its own desperate effort to preserve Judge Nixon's conviction. The conduct of the House Managers and the

The Committee should not have any illusion that Judge Nixon's resources are unlimited. Judge Nixon has spent over $300,000 in legal fees since 1984, and currently owes more than $200,000 in additional fees. I am primarily responsible for the case, and have had occasional research support from an associate in our Boston office. Boyce Holleman and Michael Holleman of Gulfport, Mississippi have provided valuable assistance when their own practice has permitted them to do so, but they are not able to provide material assistance at this time.

Between June 6 and June 12, we are to produce all of our motions and supporting memoranda. At this point, I anticipate (i) a motion to dismiss most of Impeachment Article III, (ii) a motion for full hearing by the Senate, (iii) motion for discovery, (iv) a motion for funds to permit Judge Nixon to mount a full defense, and (v) a motion _in limine_ to exclude irrelevant evidence from the evidentiary hearing. We cannot produce those materials by June 12.

During the following four business days, I am to respond to the motions of the House Managers. The House Managers have indicated by letter dated May 17, 1989 that they expect to file their own Motion In Limine, proposed stipulations of fact and proposed stipulations as to authenticity of

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government in this incident is indefensible. We will move to strike the secret material from the appellate record and will ask the court to impose sanctions on the government.

documents. Although we anticipate little problem with authenticity of documents, the motion in limine and proposed stipulations are likely to raise matters that require serious attention.

Although the abbreviated schedule poses great difficulties for Judge Nixon's counsel, it likely will create confusion for the committee and will prevent counsel from researching the law adequately in order to frame the issues and inform the Committee. In addition, this schedule leaves no time whatever for the conduct of discovery, negotiations between the parties to resolve outstanding issues, or the preparation of proposed stipulations on behalf of Judge Nixon, which would further narrow the issues.

Following the projected argument on pending motions on June 22, we then have ten business days to complete the entire pretrial statement, including briefing the law, organizing and identifying all exhibits, and listing and explaining the significance of all witnesses. Discovery, once again, is not even mentioned. Neither is any provision made for granting immunity to witnesses who are reasonably expected to decline to testify.

This unrealistic schedule contrasts sharply with the pretrial proceedings in *Hastings*, which have extended for the last ten months and will not conclude until July 10, at the earliest. On September 30, 1988, the Senate directed the parties to be prepared for a hearing by March 1, 1989. After that date passed, the Senate gave Judge Hastings until May 17, 1989, to respond to the House Managers' stipulations, which had been proposed many weeks before May 17, and also to propose his own stipulations.

We do not seek to replicate the languid pace of the Hastings proceeding, but Judge Nixon must be given adequate time to prepare and present his case. In particular, we must have time to conduct adequate discovery of relevant documents from the investigation of Judge Nixon. Our discovery demands will be neither unique or unreasonable; we will seek only the information that the House Managers already have reviewed. Among the materials we expect to request are (i) transcripts of grand jury testimony in the Nixon and related investigations, plus grand jury exhibits; (ii) the investigative files of the FBI and Justice Department; and (iii) all statements, in any form, taken from witnesses by Impeachment Counsel staff. [2] We understand that Judge Hastings has been granted discovery of all such items.

Review of these materials cannot be accomplished overnight. According to a verbal estimate by Mr. Baron, Special Counsel to the House Managers, these materials could number 100,000 pages of material. Nevertheless, it is essential that Judge Nixon have access to these materials. The importance of discovery can be readily illustrated. In the limited discovery granted by the District Court in our post-conviction proceeding last summer, we discovered an FBI teletype that reported statements by Wiley Fairchild that contradicted his trial testimony on critical disputed facts. We also discovered for the first time that the primary reason for the federal takeover of the prosecution of Drew Fairchild in March 1985 was to assure the continued cooperation of Wiley Fairchild against Judge Nixon. Both of these key facts were suppressed by the government at Judge Nixon's trial despite the government's clear legal obligation to disclose them.

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[2] In addition, for good cause, we may request the opportunity to take specific depositions before the hearing, in order to avoid cluttering the evidentiary hearing with witnesses who prove not to have relevant testimony.

Without conducting the necessary discovery, we cannot know whether similar critical evidence has been squirreled away in the files. The suggestion by the House Managers that they will give us whatever we are entitled to is simply not acceptable. We cannot rely on our adversary, whose sole job is to secure the conviction of Judge Nixon, to perform that function. In political terms, that would be the equivalent of having your media buy placed by your electoral opponent. As we have observed (see note 1, supra), the House Managers are not neutral participants in this civil proceeding and they should not be expected to act as such.

Finally, there are several specific problems with the proposed schedule. No provision is made for resolution by the full Senate of our motion to dismiss most of Impeachment Article III. As was decided in the Hastings proceeding, and as the House Managers conceded in that proceeding, such dispositive motions must be decided by the full Senate. Moreover, such dispositive motions must be decided before the evidentiary hearing, since it would be profoundly unfair to force Judge Nixon to defend against impeachment allegations that were found not to charge an impeachable offense. In addition, because the trial in this case must be conducted before the full Senate, that trial cannot be scheduled while the Hastings hearing is to be conducted, from July 10 through August 4. The House Managers also have expressed their wish to avoid simultaneous proceedings in the two cases.

III. An Alternative Schedule

With a small adjustment, the pretrial schedule may be revised to permit adequate preparation by counsel, to give the Senate the benefit of full reflection and briefing by the parties, and to allow pretrial discovery. These steps would allow the issues to be clarified and should permit a narrowing of the factual disputes for the evidentiary hearing. With such narrowing, the evidentiary phase could consume as little as eight full hearing days, defining a "full" hearing day as at least 7 1/2 hours in session, exclusive of floor votes and other delays.

Under this alternative, the work now to be completed by July 10 would be extended by only 25 days, until August 4. At that point, counsel could complete final preparations during the August recess, and the evidentiary hearing could convene immediately after Labor Day. Under this schedule, our hearing would commence after four months of pretrial preparation, compared to the 11 months of preparation allowed to Judge Hastings. This seems a modest request for additional time.

Because the current schedule imposes deadlines that begin so soon, we ask for prompt consideration of this proposed alternative. We suggest that both parties should meet soon with the Chair and Vice-Chair to review these matters.

Very truly yours,

David O. Stewart
David Overlock Stewart

DOS/paa

cc: Rule XI Committee Members
Michael Davidson
House Managers

United States Senate
WASHINGTON, DC 20510

MEMORANDUM

To: Members, Impeachment Trial Committee
on Articles Against Judge Walter L. Nixon, Jr.

From: Wyche Fowler, Jr.
Orrin G. Hatch

Re: Schedule for Pretrial Proceedings and
Commencement of Evidentiary Hearings

Date: June 6, 1989

On June 1 we met with Representative Brooks, the House Special Impeachment Counsel, and Judge Nixon's counsel, to discuss our committee's schedule for pretrial proceedings and the commencement of evidentiary hearings. At the conclusion of a full discussion, we concluded that the evidentiary hearings should begin on September 6, promptly upon our return from the August recess.

Both of us had hoped originally that we would be able to begin the committee's evidentiary hearings on July 24 in order to complete them no later than by the beginning of the August recess. The pretrial schedule which we outlined previously was aimed at a July 24 trial date. Under that schedule any pretrial motions that the parties propose to file would have been due on June 12.

Judge Nixon's counsel will be in New Orleans today to argue Judge Nixon's appeal from the denial of his motion for post-conviction relief. The appeal argues that Judge Nixon should be granted a new trial, because testimony that was critical at his trial has been recanted. Also, Judge Nixon argues that the government failed to disclose significant inducements that it provided to witnesses against him. Judge Nixon's counsel was concerned that he would have insufficient time between the argument of his appeal today and next Monday, the due date for motions. Judge Nixon's counsel also is seeking time to receive and examine materials that the House has in its possession. The House, on its side, although willing to go to trial any time that the Senate requires, expressed a concern about simultaneous evidentiary proceedings in the Hastings and Nixon impeachments. Representative Brooks is a manager in both matters, and the House Special Impeachment Counsel serves in that capacity for both impeachments.

To assure that there is no grievance about the time that the parties have to prepare for our evidentiary hearings, and to reduce the chances of overlap between committee phases of the Hastings and Nixon proceedings, we agreed to begin the evidentiary proceedings on September 6. We secured a firm commitment from Judge Nixon's counsel that he would be prepared to go to trial at that time.

Scheduling the Nixon hearings for September should help to achieve economies for the Senate. For example, we should be able to use the hearing room (the Central Hearing Facility, SH-216, between the Hart and Dirksen Senate Office Buildings) that is being prepared for the Hastings impeachment; the Senate will be able to avoid the expense of preparing the second hearing room that would be required for simultaneous impeachment proceedings. There should also be savings in staff administrative expenses.

The parties have agreed to the following pretrial schedule:

Mon., June 12	Filing and service on each other of discovery requests; the replication by the House to Judge Nixon's answer is also due on this date.
Fri., June 23	Filing and service of each side's pretrial motions, and any stipulations that either may propose to the other.
Fri., July 7	Filing and service of responses by both parties to pretrial motions.
Mon., July 10	Production of discovery material should be completed, and each side should respond to the other's proposed stipulations.
Mon., July 31	Filing and service of pretrial statements.

The committee should meet several days after July 10 to hear and rule on pretrial motions. We propose that the committee meet on Thursday, July 13, at 2 p.m..

Following the filing of pretrial statements, we should meet with both sides to resolve any questions presented by those statements. This could be done at a meeting between counsel and the chairman and vice chairman. We propose to arrange that meeting for Tuesday, August 1, at 3:00 p.m. Any member of the committee who wishes to attend that meeting is, of course, welcome to do so.

MICHAEL DAVIDSON
COUNSEL
KEN U. BENJAMIN, JR.
MORGAN J. FRANKEL
ASSISTANT COUNSEL

PHONE: (202) 224-4435
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United States Senate
OFFICE OF SENATE LEGAL COUNSEL
WASHINGTON, DC 20510-7250

June 9, 1989

Alan I. Baron, Esq.
Special Counsel
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515-6216

David O. Stewart, Esq.
Ropes & Gray
1001 Pennsylvania Ave., N.W.
Suite 1200 South
Washington, D.C. 20004

Dear Mr. Baron and Mr. Stewart:

As a result of the June 1, 1989 conference, and the suggestions which you made following it, the committee has established the following pretrial and trial schedule:

1.	Filing and service by each party of discovery requests; the replication by the House is also due on this date	June 12
2.	Filing and service of each side's pretrial motions, and any stipulations that either may propose to the other	June 23
3.	Filing and service of responses to pretrial motions	July 7
4.	Production of discovery material; also, each side to respond to the other's proposed stipulations	July 10
5.	Argument before the committee of pretrial motions	July 13, at 2 p.m.
6.	Filing and service of pretrial statements	July 31

7. Pretrial conference	August 1, at 3 p.m.
8. Evidentiary hearings	beginning September 6

As I indicated in my earlier letter, each party's pretrial statement should include (a) a list of the party's proposed witnesses; (b) a brief statement of each witness's proposed testimony; (c) the exhibits that each side proposes to offer; and (d) a statement of the legal principles that each party believes is applicable to each article of impeachment. Although the committee will not reach conclusions about the legal sufficiency of the articles, it will be important for the committee, in determining the relevancy of evidence, to know from the parties the legal theories upon which each is proceeding. In July we will describe in greater detail the required contents of the pretrial statement. If you have any suggestions about them, please let me know.

Sincerely,

Michael Davidson

PRETRIAL FILINGS ON DISCOVERY

IN THE SENATE OF THE UNITED STATES
Sitting as a Court of Impeachment

In re	)
IMPEACHMENT OF	)
WALTER L. NIXON, JR.	)
	)

THE HOUSE OF REPRESENTATIVES' REQUEST FOR DISCOVERY

The House of Representatives, through its Managers and counsel, requests that Respondent, Judge Walter L. Nixon, Jr., provide reciprocal discovery as follows:

PRELIMINARY STATEMENT

The impeachment of Judge Nixon comes before the Senate after four (4) years of contested proceedings including a criminal indictment, pre-trial discovery, a two-week jury trial, a post-trial evidentiary hearing, an unsuccessful appeal and petition for writ of certiorari, a motion to vacate the conviction, additional discovery in connection with said motion, a two-day evidentiary hearing on the motion to vacate, and lengthy evidentiary hearings in the House whereby Respondent was made fully aware of the facts giving rise to the impeachment charges against him.

Respondent's counsel admits that the impeachment articles contain "nothing new."

Under these circumstances, the House Managers assert that discovery in the Senate proceedings should be limited to (1) documents intended to be offered in the case-in-chief; (2) statements that are sworn or adopted by witnesses who will testify at trial; (3) transcripts or substantially verbatim statements of witnesses who will testify at trial; and (4) exculpatory materials. Accordingly, the House submits this request for reciprocal discovery from Judge Nixon.

DEFINITIONS

1. Each request set forth below refers to documents in the custody, control or possession of Judge Walter L. Nixon, Jr., his attorneys (including Michael Fawer, David Stewart, Boyce Holleman and Michael Holleman), and any other persons empowered to act on behalf of Judge Nixon.

2. As used throughout this Request for Production, the term "document" shall include any written, printed, typed or other graphic matter of any kind or nature; all mechanical, magnetic, electronic sound recordings or transcripts thereof; all data, information or statistics contained on any memory device or other retrieval system; and without limitation all files, file jackets and folders,

books, pamphlets, correspondence, letters, reports, charts, diagrams, graphs, studies, proposals, workpapers, notes, ledgers, diaries, journals, books of account, memoranda, telephone call slips, financial data, checks and bank statements, summaries and compilations. The term "document" shall also mean all copies of documents that contain handwritten comments, alterations or notations of any kind.

3. If there is a claim of privilege with respect to any document requested, identify the document, its date, the names of the addressee and addressor and any person to whom the document was given, the subject matter of the document, and the basis for the claim of privilege.

DOCUMENTS

1. All documents that Judge Nixon intends to offer into evidence in his defense case-in-chief during the impeachment trial;

2. All statements, whether sworn or adopted, of any witness who is scheduled to testify at the impeachment trial;

3. All transcripts of sworn testimony, affidavits, or substantially verbatim statements of witnesses who are scheduled to testify at the impeachment trial.

It is the position of the House that discovery for both parties should be limited to the foregoing, with the

House bearing the additional obligation to disclose exculpatory materials, if any. However, to the extent that the Senate determines that discovery should proceed on a broader basis, the House seeks the following additional categories of materials:

a. All exhibits offered or introduced into evidence during post-conviction proceedings in Nixon v. United States, Civ. No. H-88-0052(G) (S.D. Miss, Hattiesburg Div.);

b. Any document that is inconsistent with the statements given by Respondent in his April 1984 interview, his July 1984 grand jury testimony, his criminal trial testimony, or his testimony and affidavit before the House Subcommittee on Civil and Constitutional Rights.

c. Any document reflecting contact of any kind between Respondent and the following persons or entities: Paul H. "Bud" Holmes, Carroll Ingram, Wiley Fairchild, W. R. Fairchild Construction Co., Ltd. and George Phillips, including correspondence, notes of conversations, tape recordings or other documents as defined above.

d. Calendars or diaries of Respondent for the years 1982-1983.

e. Any document pertaining in any way to The Boam Co., et. al. v. Dependable Insur. Co. et al., Jack Seymour v. L&A Contracting Co., et al., State v. Redditt Andrew

Fairchild, et al., or Respondent's involvement in or knowledge of said cases.

f. Any document that might tend to establish or corroborate any fact or argument presented by the government during Respondent's criminal trial, appellate or post-conviction proceedings.

g. Any document not previously introduced as a House Subcommittee exhibit that might tend to establish or corroborate any fact or finding set forth in the Report of the Committee on the Judiciary of the U.S. House of Representatives concerning H.Res. 87, impeaching Respondent.

h. Any document not previously introduced as an exhibit during the Subcommittee proceedings that might tend to impeach the credibility of any witness who is scheduled to testify at the impeachment trial.

Respectfully submitted,

The United States
House of Representatives

By Alan I. Baron (RGK)
Special Counsel

Managers of the House of Representatives

Jack Brooks
Don Edwards
Benjamin L. Cardin

F. James Sensenbrenner
William E. Dannemeyer

Impeachment Trial Staff

Alan I. Baron, Special Counsel
Peter E. Keith, Assistant Special Counsel

House Judiciary Committee Staff Participating in the Impeachment Proceedings

William Jones, General Counsel
Daniel Freeman, Counsel
Catherine A. LeRoy, Counsel
Colleen Kiko, Counsel

IN THE SENATE OF THE UNITED STATES
Sitting As A Court Of Impeachment

In re)

IMPEACHMENT OF)
JUDGE WALTER L. NIXON, JR.)

JUDGE NIXON'S DISCOVERY REQUEST

Judge Nixon makes the following request for documentary materials.[1] At this point, we ask only that the requested material be provided to Judge Nixon's counsel at a convenient location in the District of Columbia and under conditions that permit unobstructed review of the materials during ordinary business hours. We also ask that a copy be made of all materials for which we determine that we need a copy. We do not seek copies of all of the requested materials, but only the opportunity to review the requested materials and acquire copies of those items that we need.

Each of these requests should be understood to refer to documents in a generic sense, which include memoranda, reports, notes, photographs, correspondence, sketches, writings of any kind, tape-recordings (audio or video) and magnetic computer tape or computerized information recorded on any medium. We request the following materials:

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[1] Most of this material previously was requested in correspondence to Special Impeachment Counsel and the United States Department of Justice dated June 1, 1989; that early request was submitted in order to permit the House Managers to begin their production of materials at an early point and avoid delays or last-minute disputes over the scope of production, and we understand the Chair and the Vice-Chair of the Rule XI Committee to have requested such compliance at the conference on June 1, 1989.

1. All statements, affidavits, transcripts of witness statements, and interview memoranda, and memoranda including or referring to statements of witnesses, which have been acquired by Special Impeachment Counsel staff or other investigators or counsel from any other federal agency in connection with any investigation of Judge Nixon.

2. All documentary materials which have been acquired by the Impeachment Counsel staff, by subpoena or through voluntary production, in the course of the investigation.

3. All transcripts of grand jury testimony of the Special Grand Jury empaneled on July 18, 1984 in Hattiesburg, Mississippi and any other grand jury (including any grand jury in the Southern District of Mississippi or the Northern District of Florida) that has heard testimony relating to any allegations concerning Judge Nixon.

4. With respect to each grand jury identified in connection with the previous paragraph, all documentary exhibits and other materials received by the grand juries referred to in the proceeding paragraph.

5. FBI and Justice Department investigative files that have been reviewed by the Special Impeachment Counsel staff since March of 1988, including the memoranda recommending prosecution of Paul "Bud" Holmes of Hattiesburg in 1985,

Wiley Fairchild of Hattiesburg in 1984, and Judge Nixon in 1985.

6. The identity of any expert witness consulted by the House Managers or the House Impeachment Counsel staff in connection with this proceeding, and, if the expert witness is expected to be testify in this proceeding, all writings and correspondence between that expert witness and the House Managers and the House Impeachment Counsel staff.

We also would request that any objection to production of these materials be made at the earliest possible time, to permit the matter to be submitted before the Senate for resolution without delay to this proceeding.

Respectfully submitted,

Boyce Holleman/DOS
BOYCE HOLLEMAN
MICHAEL B. HOLLEMAN
BOYCE HOLLEMAN, P.A.
P.O. Drawer 1030
Gulfport, Mississippi 39502
(601) 863-3142

David O. Stewart
DAVID OVERLOCK STEWART
ROPES & GRAY
1001 Pennsylvania Ave., N.W.
Suite 1200 South
Washington, D.C. 20004
(202) 626-3900

Date: June 12, 1989

DOSDISC1.MX

IN THE SENATE OF THE UNITED STATES
Sitting As A Court Of Impeachment

In re)
)
IMPEACHMENT OF)
JUDGE WALTER L. NIXON, JR.)

CERTIFICATE OF SERVICE

I, David Overlock Stewart, do hereby certify that I have caused a copy of Judge Nixon's Discovery Request to be served by first-class mail, postage prepaid to:

Rep. Jack Brooks, House Manager
Rep. Benjamin L. Cardin, House Manager
Rep. William E. Dannemeyer, House Manager
Rep. Jim Sensenbrenner, House Manager
Rep. Don Edwards, House Manager
Michael Davidson, Counsel, U.S. Senate
Alan I. Baron, Counsel, U.S. House of Representatives

David O. Stewart
DAVID OVERLOCK STEWART

Date: June 12, 1989

IN THE SENATE OF THE UNITED STATES
Sitting As A Court of Impeachment

In re)
IMPEACHMENT OF)
JUDGE WALTER L. NIXON, JR.)

JUDGE NIXON'S STATEMENT CONCERNING THE STATUS OF DISCOVERY

Judge Walter L. Nixon, Jr., through his undersigned counsel, hereby states to the Senate that because the discovery process has not yet been initiated, it is impossible to determine whether it will be necessary to seek any further order from the Senate concerning discovery. The House Managers have stated that they will begin making discovery materials available next week (the week of June 26); until we have had an opportunity to review the material produced, we cannot determine whether we need to bring a motion to compel proper production of materials.

Similarly, the House Managers have submitted a "conditional" request for Judge Nixon to respond to a broad and inappropriate discovery request that would require Judge Nixon to try to prove the House Managers' case for them. Because the House Managers have submitted that request in a conditional form, we do not believe there is yet any dispute over that request that needs to be submitted to the Senate.

We submit this statement to alert the Senate that, as events unfold, it may become necessary to submit discovery issues to the Senate.

Respectfully submitted,

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Date: June 23, 1989

IN THE SENATE OF THE UNITED STATES
Sitting as a Court of Impeachment

In re)
)
IMPEACHMENT OF)
WALTER L. NIXON, JR.)

THE HOUSE OF REPRESENTATIVES' RESPONSE TO JUDGE NIXON'S DISCOVERY REQUEST

The House of Representatives, through its Managers and counsel, responds as follows to the discovery requests of Respondent, Judge Walter L. Nixon, Jr.

Preliminary Statement

As set forth below, the House strongly objects to portions of Respondent's discovery requests. Respondent essentially seeks to duplicate the House's impeachment investigation and gain equal access to every shred of information gathered or reviewed by the House, including information that did not give rise to impeachment articles and will not be at issue before the Senate. Respondent's requests are overbroad and seek the privileged work product of Congress.

A person under investigation by the House or Senate, whether in regard to confirmation to hold public office, impeachment to determine fitness to continue to hold office or some other special investigative context, is not entitled to learn everything that Congress discovers about him. As a matter of fairness and due process, a person subject to Congressional inquiry should be entitled to know the charges and specific proof against him. But no broader right of discovery should be afforded to a person under investigation. To grant further access would intrude upon the Congressional investigative prerogative and interfere with Congress' ability to seek the truth. Sources of information will be far less forthcoming if it is understood that everything brought to the attention of Congress will be turned over to the subject of the investigation.

In addition, the wide-open discovery sought by Respondent, as if this were civil litigation only recently filed, is inappropriate given the nature of this proceedings. The impeachment of Judge Nixon comes before the Senate after four (4) years of contested proceedings including a criminal indictment, pre-trial discovery, a two-week jury trial, a post-trial evidentiary hearing, an unsuccessful appeal and petition for writ of certiorari, a motion to vacate the conviction, additional discovery in connection with said motion, a two-day evidentiary hearing on the motion to vacate, and lengthy evidentiary hearings in the House whereby Respondent was made fully aware of the facts giving rise to the impeachment charges against him. Even Respondent's own counsel admits that the impeachment articles contain "nothing new."

Under these circumstances, the House Managers assert that discovery in the Senate proceedings should be limited to (1) documents intended to be offered in the case-in-chief; (2) statements that are sworn or adopted by witnesses who will testify at trial; (3) transcripts or substantially verbatim statements of witnesses who will testify at trial; and (4) exculpatory materials.

Accordingly, as set forth below, the House shall provide Respondent all materials falling within the aforementioned categories. Moreover, in the spirit of compromise sought by the Chairman and Vice Chairman during their June 1 meeting with counsel, and to avoid burdening the Committee with discovery squabbles, the House agrees to provide voluntarily the additional material described below. With these concessions by the House, Respondent will obtain the same access to material as that afforded to Judge Alcee L. Hastings of Florida, who is currently facing impeachment charges before a separate Senate Committee.

Request No. 1: All statements, affidavits, transcripts of

> witness statements, and interview memoranda, and memoranda including or referring to statements of witnesses, which have been acquired by Special Impeachment Counsel staff or other investigators or counsel from any other federal agency in connection with any investigation of Judge Nixon.

Response to Request No. 1: The House objects to this request, which is far too broad and seeks the internal, privileged work product of the House and its agents. The House agrees to provide all statements, affidavits and transcripts of witnesses scheduled to testify at trial in these proceedings. However, the House declines to provide materials concerning persons not scheduled to testify. The House also refuses to provide interview memoranda that constitute internal, investigative work product of the House. Exculpatory materials, if any, and from any source, will be provided.

Request No. 2: All documentary materials which have been acquired by the Impeachment Counsel staff, by subpoena or through voluntary production, in the course of the investigation.

Response to Request No. 2: The House objects to this request. Again, Respondent seeks to follow in the footsteps of the House's investigation and gain access to materials that will not be introduced into evidence during the case-in-chief against him. However, in the spirit of compromise requested by the Chairman and Vice-Chairman of the Committee, the House will make available to Respondent all subpoenaed records produced by third parties that Respondent would otherwise have an independent right to review, by virtue of his status as an account holder at a bank or similar status. The House declines to produce materials, gained during its investigation through voluntary production by third parties, that will not be introduced in the case-in-chief against Respondent. However, exculpatory materials, if any, and from any source, will be provided.

Request No. 3: All transcripts of grand jury testimony of the Special Grand Jury empaneled on July 18, 1984 in Hattiesburg, Mississippi and any other grand jury (including any grant jury in the Southern District of Mississippi or the Northern District of Florida) that has heard testimony relating to any allegations concerning Judge Nixon.

Response to Request No. 3: The House will provide Respondent with copies of all grand jury testimony of witnesses scheduled to testify at trial. No other grand jury testimony will be provided. Respondent has no right to probe into the secret, grand jury testimony of witnesses who will not testify at trial against him. However, exculpatory materials, if any, and from any source, will be provided.

Request No. 4: With respect to each grand jury identified in connection with the previous paragraph, all documentary exhibits and other materials received by the grand juries referred to in the proceeding paragraph.

Response to Request No. 4: The House will provide

Respondent with any grand jury materials that will be used in the case-in-chief against him. No other grand jury exhibits or documents will be provided. However, exculpatory materials, if any, and from any source, will be made available to Respondent.

Request No. 5: FBI and Justice Department investigative files that have been reviewed by the Special Impeachment Counsel staff since March of 1988, including the memoranda recommending prosecution of Paul "Bud" Holmes of Hattiesburg in 1985, Wiley Fairchild of Hattiesburg in 1984, and Judge Nixon in 1985.

Response to Request No. 5: The House will provide Respondent with any materials that will be used in the case-in-chief against him. Moreover, in the spirit of compromise requested by the Committee, to the extent acceptable to the FBI the House will make available that agency's investigative files as was done in pre-trial discovery in the impeachment proceedings involving Judge Alcee L. Hastings. No other materials sought in this request in the possession of the House will be produced. However, any exculpatory materials, from any source, will be provided to Respondent.

Request No. 6: The identity of any expert witness consulted by the House Managers or the House Impeachment Counsel staff in connection with this proceeding, and, if the expert witness is expected to testify in this proceeding, all writings and correspondence between that expert witness and the House Managers and the House Impeachment Counsel staff.

Response to Request No. 6: The House has consulted with Professors Andrew Kaufman of Harvard Law School and Steven Lubet of Northwestern University School of Law. Respondent is familiar with these gentlemen and had the opportunity to cross-examine them during Subcommittee hearings. If these experts are scheduled to testify, the House will provide the requested correspondence in the spirit of compromise requested by the Committee, so long as Respondent provides the House with reciprocal material concerning any expert who may be scheduled to testify on behalf of Respondent. Any exculpatory material will be provided to Respondent.

Respectfully submitted,

The United States
House of Representatives

By Alan I. Baron (PEK)
Alan I. Baron
Special Counsel

Managers of the House of Representatives

Jack Brooks
Don Edwards
Benjamin L. Cardin
F. James Sensenbrenner
William E. Dannemeyer

Impeachment Trial Staff

Alan I. Baron, Special Counsel
Peter E. Keith, Assistant Special Counsel

House Judiciary Committee Staff Participating in the Impeachment Proceedings

William Jones, General Counsel
Daniel Freeman, Counsel
Catherine A. LeRoy, Counsel
Colleen Kiko, Counsel

ONE HUNDRED FIRST CONGRESS
Congreſs of the United States
House of Representatives
COMMITTEE ON THE JUDICIARY
2137 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6216

June 29, 1989

David O. Stewart, Esq.
Ropes & Gray
1001 Pennsylvania Avenue, N.W.
Washington, D. C. 20004

RECEIVED JUN [illegible]

Re: Nixon Impeachment

Dear David:

As we discussed on Monday, in response to Judge Nixon's discovery requests and in the spirit of compromise sought by the Senate Impeachment Trial Committee, the House of Representatives has made available to you records that go beyond the four categories of documents that reflect the House's position concerning the proper scope of discovery. Since Judge Nixon has been provided with broader discovery than that deemed appropriate by the House, we must insist that Judge Nixon provide all requested reciprocal discovery.

Accordingly, please advise us whether you intend to produce records responsive to items (a) through (g) in the House of Representatives' Request for Discovery, so that if necessary any dispute may be brought to the attention of the Impeachment Trial Committee.

Sincerely,

Pete

Peter E. Keith
Assistant Special Counsel

PEK/dw

cc: Michael Davidson, Esq.

RECEIVED JUL 05 1989

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July 5, 1989

Peter E. Keith, Esq.
Assistant Special Counsel
U.S. House of Representatives
House Annex 2, Room 366
Washington, D.C. 20515

Re: Discovery

Dear Peter:

I write in response to your letter of June 29, 1989, concerning your request for discovery, in which you advise that you now wish to press your discovery requests (a) through (g), which we had previously understood to be conditional.

Without addressing or conceding the House Managers' right to materials described in discovery requests (a) through (e), I can offer the following remarks on those requests. I have assumed that you had copies of the exhibits from the post-conviction proceedings (your discovery request (a)); if you do not have a set, I will be glad to provide you with a copy. I am searching for materials that would be responsive to discovery requests (b), (c), (d), and (e), and will advise you if we find any that were not previously available to the FBI.

With respect to the material covered by discovery requests (f), (g), and (h), I am unwilling even to offer informal remarks. Those requests are entirely inappropriate, as they seek to impose on Judge Nixon the burden of determining which materials might assist the House Managers in the presentation of their case. Even the loosest civil discovery practice would not permit such a burden to be placed on a party, while -- as you know -- such a burden would be unthinkable in a criminal case. You surely must appreciate the difference in posture, for discovery purposes, between a public investigative office such as yours and an accused individual. The individual cannot be made to take responsibility for proving the charges against him, which is precisely the responsibility that your requests (f), (g), and (h) seek to impose. Without in any way conceding that you have a right to any discovery beyond your requests (1), (2) and (3), I can assure you that we will make no response to requests (f), (g), and (h).

I hope that this response is of assistance. On my own account, I would raise two issues. First, I must inquire as to when we might begin receiving the discovery materials which we reviewed in your offices last week? Some of that material may be material to our responses that are due to be submitted to the Committee on Friday, July 7, so I would appreciate your prompt attention to these concerns.

Second, I wish to confirm in writing our conversation last week during which you stated that the House Managers intend to provide to Judge Nixon all transcripts of testimony or sworn or adopted statements of those witnesses who are designated as witnesses for the Senate trial. Of course, it would be important for those materials to be provided at the earliest possible point after the designation of witnesses currently scheduled for July 31. If you disagree with or take issue with any statement in this paragraph, please notify me promptly so the matter can be submitted to the Senate in a timely fashion.

Very truly yours,

David O. Stewart

David Overlock Stewart

DOS/paa

cc: Michael Davidson (by hand)

RECEIVED

RECEIVED 1989

ONE HUNDRED FIRST CONGRESS

Congress of the United States
House of Representatives
COMMITTEE ON THE JUDICIARY
2137 Rayburn House Office Building
Washington, DC 20515-6216

July 6, 1989

David O. Stewart, Esq.
Ropes & Gray
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Suite 1200 South
Washington, [illegible]. 20004-

Re: Nixon Impeachment

Dear David:

This is in response to your letter of yesterday and to confirm our conversation this morning. With regard to the post-conviction exhibits, please proceed to provide us with a copy so that we will have a full set. In addition, please provide us with a copy of the Judge's 1983 pocket calendar you discovered in response to the House's request (d).

Concerning the House's discovery requests (f), (g) and (h), I disagree with your contention that these requests are "entirely inappropriate." As you know, until the impeachments this year of Judges Hastings and Nixon, discovery had never been granted in impeachment proceedings. Nevertheless, in response to the Impeachment Trial Committee's request for cooperation, the House has provided you with the opportunity to review and copy thousands of pages of additional material beyond the four categories forming the House's original discovery position. If broad discovery is to be allowed, it should not just be a one-way street.

Requests (f), (g) and (h) are designed to ensure that any relevant materials in the exclusive possession of Judge Nixon will be brought to the Senate's attention so that it may make a completely informed and fair decision. If, for example, Judge Nixon has a tape recording of a disputed conversation relevant to the impeachment inquiry, a document that calls into question the credibility of a witness, a document establishing his whereabouts on a date in question, or some other pertinent information that for some reason has not yet surfaced, the House is requesting that he disclose the material in fairness to the Senate, the public and the impeachment process.

You indicate that Judge Nixon will refuse to respond to Requests (f), (g) and (h), apparently based upon his privilege against self-incrimination. Whatever your position, I am sure you will agree that there is no reason to debate a privilege issue if there simply are no documents responsive to Requests (f), (g) and (h). Perhaps you could determine whether, as a threshold matter, any such records exist, so that needless controversy can be avoided. I do not believe that this effort will be much of a "burden." We are not asking for an independent search for records, but only that you review the requests with the Judge in good faith and, based upon your and his knowledge of the case, produce any responsive documents.

With regard to the discovery materials you and your associates reviewed last week, two boxes containing the copies you requested are accompanying this letter.

Finally, the House Managers will provide you with all transcripts of testimony or sworn or adopted statements of any person designated by the parties to be a witness at trial, unless for some reason there is an objection based upon your designation. These materials will be provided as quickly as possible after the July 31 designation of witnesses. Moreover, as discussed in our telephone conversation this morning, this will confirm that you will also provide any transcripts or statements of any designated witness, also in a timely fashion, in response to the House's discovery requests 2 and 3.

Sincerely,

Peter E. Keith

Peter E. Keith
Assistant Special Counsel

PEK/dw

cc: Michael Davidson, Esq.

PRETRIAL FILINGS ON MOTIONS AND PROPOSED STIPULATIONS

IN THE SENATE OF THE UNITED STATES
Sitting As A Court of Impeachment

In re)
IMPEACHMENT OF)
JUDGE WALTER L. NIXON, JR.)

JUDGE NIXON'S MOTION FOR IMMUNITY ORDER

Judge Walter L. Nixon, Jr., through his undersigned counsel, hereby moves that the Senate seek an order granting testimonial immunity to Robert Royals of Hattiesburg Mississippi pursuant to 18 U.S.C. §§ 6002 & 6005. In support of this motion, Judge Nixon states the following:

1. During his testimony on several occasions, Wiley Fairchild has stated that the phone call from Bud Holmes' farm, which is at the center of the allegations in this case, occurred shortly after Bob Royals visited him and talked about money and the drug prosecution of Fairchild's son, Drew Fairchild. Wiley Fairchild recalled that Royals reported certain remarks that Bill Porter, Drew Fairchild's lawyer, had made while Royals and Porter travelled to visit a mutual friend at the federal prison in Montgomery, Alabama, just a few days before the Royals-Wiley Fairchild conversation.

2. During Judge Nixon's trial, Royals was brought to the courthouse by Nixon's defense lawyer and was asked to testify. Nixon's counsel advised the court that he believed Royals would testify that the events described by Wiley Fairchild had occurred in the summer or early fall of 1981 --

which would have been sharply inconsistent with Bud Holmes' testimony that those events occurred in May 1982.

3. During a conference in the judge's chambers, defense counsel requested that the government or the court grant immunity to Royals. Royals refused to testify without immunity because during previous grand jury testimony he had stated that he had no such conversation with Wiley Fairchild. The prosecutor confirmed that Royals had given such grand jury testimony, but both the Court and the government refused to grant him immunity. Royals did not testify.

4. The date of the phone call from Bud Holmes' farm will be an issue in the Senate trial, just as it was in the initial trial. Royals' testimony may well be material to this case. We cannot state with certainty that we will seek to call Royals as a witness, but we may well do so. In order to preserve our ability to call Royals as a witness, the Senate should secure an immunity order.

Respectfully submitted,

Boyce Holleman / DOS

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(202) 626-3900

Date: June 23, 1989

IN THE SENATE OF THE UNITED STATES
Sitting As A Court Of Impeachment

In re	)
	)
IMPEACHMENT OF	)
JUDGE WALTER L. NIXON, JR.	)

JUDGE NIXON'S MOTION IN LIMINE

Respondent Walter L. Nixon, Jr., through his undersigned counsel, moves that the Senate exclude from the evidentiary proceedings in this case the following materials:

1) All testimony, evidence, or substantive reference to the oil and gas properties that he purchased from Wiley Fairchild; and

2) All transcripts of testimony from any previous proceeding, except to the extent such transcripts are used to impeach, contradict or refresh the recollection of a witness then testifying, or if the witness whose transcript is offered is unavailable to testify under subpoena.

Such limitations on the evidence would produce a better focused, shorter, and more fair hearing. The reasons supporting this Motion are set forth at greater length in the accompanying memorandum in support.

Respectfully submitted,

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Date: June 23, 1989

IN THE SENATE OF THE UNITED STATES
Sitting As A Court Of Impeachment

In re	)
	)
IMPEACHMENT OF	)
WALTER L. NIXON, JR.	)

MEMORANDUM IN SUPPORT OF JUDGE NIXON'S MOTION IN LIMINE

In the interests of economy, efficiency and fairness, respondent Nixon moves the Senate to exclude from evidence two categories of possible evidence:

1) References to and materials concerning the oil and gas investment purchased by Judge Nixon from Wiley Fairchild; and

2) Transcripts of prior testimony except to the extent such transcripts are necessary to impeach, contradict or refresh the recollection of a witness, or when a witness is unavailable to testify under subpoena by the Senate.

These materials are not relevant to the allegations in the Articles of Impeachment, and their exclusion will both accelerate the trial and prevent the Senate from being distracted by irrelevant matters.

I.

NIXON'S PURCHASE OF OIL INTERESTS IS IRRELEVANT TO THE ARTICLES OF IMPEACHMENT

The investigation of Judge Nixon by the Hattiesburg Special Grand Jury was triggered by an accusation that Wiley Fairchild, a wealthy Hattiesburg businessman, had paid a bribe to Judge Nixon in return for lenient treatment for Wiley's son, Drew, who then faced state charges for smuggling a ton of marijuana. The accuser was Robert L. "Skip" Jarvis, who had married a relative of Wiley's and wanted to force Wiley, then in his 70's, out of the family business.

Jarvis had no evidence to support his accusation, as Nixon's prosecutor has conceded. Indeed, the prosecutor admitted as much to the jury, telling them that Jarvis "offers no evidence of misconduct against Judge Nixon." United States v. Nixon, No. H85-00012(L), (S.D. Miss.), Trial Tr., p. 1837. The prosecutor made the same admission in testimony before a House Subcommittee, saying that Jarvis "had no knowledge that Judge Nixon did a blessed thing wrong in the Drew Fairchild case." *See* "Judge Walter L. Nixon, Jr., Impeachment Inquiry," Hearings before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm., 100th Cong., 2d Sess. 76 (1988) [hereinafter "House Hearings"].

But Skip Jarvis was not the only one who had no evidence to support bribery allegations; there never has been *any* such evidence. After more than a year of investigation, the prosecutor lacked a basis for charging any bribery, since Drew Fairchild's case was a state case with which Nixon never had any actual or even possible official contact. The prosecutor could charge Nixon only with "receiving an illegal gratuity," an offense which, as construed by the Fifth Circuit, does not require any "quid pro quo" in an official's dealings, but only a showing that he received something of value from someone who hoped to receive an official benefit.

But the prosecutor could not make even the gratuity charge stick. During the trial, the prosecutor admitted, he was "disappointed" by the evidence on the gratuity count. House Hearings, supra, at 76. Indeed, the press later reported that the prosecutor "said he had no quarrel with the jury for acquitting Nixon on charges of accepting an illegal gift because the case was not proven." Jackson Clarion-Ledger, Feb. 7, 1987, p. B-1. The National Law Journal has reported that the prosecutor told reporters during the trial that "he did not expect that the first count of the indictment -- [the gratuity charge] -- would stick. . . ." National Law Journal (Apr. 4, 1988), p. 25.

The jury agreed with the prosecutor that there was no evidence of wrongdoing in Nixon's purchase of the oil and gas interests purchased. The jury acquitted on Count I, even though testimony on the investment had consumed at least half of the prosecution's case at trial. [1]

The House Subcommittee also agreed that there was no misconduct in connection with the investment; no Article of Impeachment was even proposed relating to the investment. Again, however, at least half of the testimony before the House Subcommittee concerned the circumstances of the investment. Special Impeachment Counsel questioned witnesses in excruciating detail concerning the minutiae of legal instruments concerning oil and gas investments, as well as the performance of the properties in which Nixon invested.

There is no reason for the Senate trial to become similarly bogged down in irrelevant details about transactions that have not been charged as providing any basis for removing Nixon from office.

Pretrial motions in limine are used by the courts to "improve the quality of justice rendered... by sharpening the preparation and presentation of cases, tending to eliminate trial surprise..." (Advisory Committees Notes to 1983 Amendment of Federal Rule of Civil Procedure 16). The Senate can focus the trial on the matters truly in issue and increase the efficiency of the trial by excluding unnecessary evidence on the investment.

---

[1] The investment was the only subject of testimony by two government witnesses (Skip Jarvis and Allen Jackson) and was the major subject of testimony by Wiley Fairchild and Carroll Ingram.

II.

TRANSCRIPTS OF PRIOR TESTIMONY ARE NO SUBSTITUTE FOR LIVE TESTIMONY

At both civil and criminal trials, transcripts of prior testimony are not admissible unless the witness is not available to testify at trial. We urge the Senate to apply the same rule to this proceeding.

The right to see and confront witnesses before the fact finder is constitutionally required in criminal cases by the Confrontation Clause of the Sixth Amendment. In civil cases, the rules against hearsay provide similar protection. See Federal Rules of Evidence 801-806. The general rule, with a host of inapplicable exceptions, is that hearsay (an out of court statement used to prove the truth of the matter asserted) is inadmissable. The scope of the hearsay rules is, in many cases, broader than the Sixth Amendment requirement for criminal trials. See California v. Greene, 399 U.S. 149, 156 (1970).

From a constitutional perspective, an impeachment trial has greater significance than either a civil or criminal proceeding. Live testimony is strongly preferred because it allows the decisionmaker more accurately to gauge the truth of the testimony. See id. at 157. The purpose of confronting a live witnesses is to afford the accused "an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony, whether he is worthy of belief." Mattox v. United States, 156 U.S. 237, 242-43 (1895). In fact, without proper confrontation the integrity of the entire fact-finding process becomes suspect. See Ohio v. Roberts, 448 U.S. 56, 64 (1980).

Under both the Sixth Amendment and the Federal Rules of Evidence (approved by the Senate on December 18, 1974), prior testimony may be admitted, but only when the witness is unavailable. "In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement he wishes to use against the defendant." Ohio v. Roberts, 448 U.S. at 65. See also Federal Rules of Evidence 804(b)(1). In both civil and criminal cases, the party wishing to introduce prior testimony must demonstrate the unavailability of the witness. See e.g., Driscoll v. Schmitt, 649 F.2d. 631 (8th Cir. 1981); Redhead v. United States, 686 F.2d. 178 (3rd Cir. 1982). When the witness is available to testify, there are no provisions in either the civil or criminal law for allowing prior testimony in place of live testimony. The leading scholar authority on evidence has described the acceptance of prior testimony in this way (J. Wigmore, 5 Evidence § 1402 (Cladborne Rev., 1924)):

> **The general principle upon which depositions and former testimony should be resorted to is the simple principle of necessity i.e., the absence of any other means of utilizing the witness' knowledge. If his testimony given anew in court cannot be had, it will be lost entirely for the purpose of doing justice if it is not received in the form in which it survives and can be had. The only inquiry, then need be: Is the testimony in court unavailable?**

In this case, unless the witnesses are unavailable to testify, the transcripts of prior testimony should not be needed.

In cases of grave political significance, the importance of live testimony is heightened. The hostility to reliance on prior testimony has its roots in the 1603 treason trial of Sir Walter Raleigh, where the prosecution relied on written statements by a witness who was available to testify. Those prior statements had since been retracted by the witness, but Raleigh was not allowed to call him to the stand and was convicted on the weight of this written testimony. Reaction against this miscarriage of justice prompted development of the hearsay rule and, ultimately, the Confrontation Clause of the Sixth Amendment. See California v. Greene, 399 U.S. 149, 157 n.10; F. Heller, The 6th Amendment 104 (1951).

In order to prevent a similar miscarriage of justice and to discharge responsibly its constitutional duty to try impeachment cases, the Senate must insist on live witness testimony whenever witnesses are available.

CONCLUSION

For all of the foregoing reasons, we urge the Senate to exclude the use of transcripts of testimony except when the witness is unavailable to testify, or for purposes of contradicting, impeaching or refreshing the recollection of the witnesses.

Respectfully submitted,

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Date: June 23, 1989

IN THE SENATE OF THE UNITED STATES
Sitting As A Court Of Impeachment

In re)
)
IMPEACHMENT OF)
JUDGE WALTER L. NIXON, JR.)

JUDGE NIXON'S MOTION FOR TRIAL BY THE SENATE

Respondent Walter L. Nixon, Jr., through his undersigned attorneys, hereby moves that the Senate trial in this case be convened before and conducted in the presence of the entire body of the Senate, as required by Article I, section 3, clause 6 of the Constitution, as set forth at greater length in the attached supporting Memorandum.

Respectfully submitted,

Boyce Holleman/DCS
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MICHAEL B. HOLLEMAN
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(202) 626-3900

Date: June 23, 1989

IN THE SENATE OF THE UNITED STATES
Sitting As A Court Of Impeachment

In re)
)
IMPEACHMENT OF)
JUDGE WALTER L. NIXON, JR.)

MEMORANDUM IN SUPPORT OF JUDGE NIXON'S MOTION FOR TRIAL BY THE SENATE

By Resolution 128, the Senate has created a committee of twelve senators to receive all of the evidence and testimony in this case, pursuant to Senate Impeachment Rule XI. We urge the Senate to reconsider that decision because (i) Impeachment Rule XI does not authorize conducting an impeachment trial before a committee over the objection of the impeachment respondent; (ii) the Constitution plainly requires that impeachment trials be conducted before the full Senate; and (iii) fairness to the impeachment respondent and a proper regard for the independence of the judiciary require trial before the full Senate.

At the outset, we should emphasize that our objection to trial by committee also is based on practical concerns. The Senate has concluded in both the Claiborne and Hastings impeachments that a jury verdict is no substitute for trial by the Senate, and that a jury verdict does not relieve the Senate of its obligation to examine the facts and law fully and reach its own decision on any charges. The House Managers in the Hastings case have acknowledged this point:

"In both a legal and a constitutional sense, the jury verdict is irrelevant to your [the Senate's] . . . ultimate decision whether to convict Judge Hastings on any of the Articles of Impeachment."

A trial -- particularly in this case -- turns on nuances of testimony and the credibility of witnesses. But trial by committee means that eighty-eight members of the jury will not know the facts very well. One member of the Rule XI committee in the Claiborne case has admitted that "the labors and the tactical decisions of the special impeachment committee played a determinative role in the Senate's impeachment of Judge Harry E. Claiborne." McConnell, Reflections on the Senate's Role in the Judicial Impeachment Process and Proposals for Change, 76 Ky. L.J. 739, 750 (1987-88) (emphasis added). That is exactly what the Framers did not intend. This trial cannot be fair if more than seven-eighths of the jurors do not know the facts.

I.

SENATE IMPEACHMENT RULE XI DOES NOT AUTHORIZE THE SENATE TO COMPEL IMPEACHMENT TRIAL BEFORE A COMMITTEE

Until 1986, all impeachment trials were conducted on the Senate floor in full view of all Senators. The current version of Rule XI was adopted by the Senate in 1936, while impeachment articles were pending against District Judge Halsted Ritter of Florida. The text of the rule does not expressly authorize the Senate to force an impeachment respondent to undergo trial before a committee. Rule XI authorizes the committee to take testimony and receive evidence "at such times and places that the committee may determine." The floor debate concerning Rule XI makes clear, however, that the Senate never intended to force an impeachment respondent to endure trial by committee against his will.

After Rule XI was approved, its sponsor, Sen. Ashurst of Arizona, admitted in floor debate, "A considerable division of opinion exists as to whether the Senate possesses the power to have the testimony in impeachment trials taken by committee." 80 Cong. Rec. 3424 Part 3 (March 9, 1936). Sen. Ashurst explained that the 1933 impeachment trial of District Judge Harold Louderback of New York had been "dreary, involved, and protracted." Id. at 3425. A number of senators, according to Sen. Ashurst, urged the Judiciary Committee to find some less onerous method for trying impeachments, and the new Rule XI was the result. Id.

Sen. Thomas of Utah spoke in support of the new rule, arguing that the standards of conduct for a "United States judge [are] set so high under our constitutional theory, the trial of a judge should be set even higher." Id. at 3424. Sen. Thomas endorsed trial by committee as superior to trial by the full Senate, arguing that the "constant attention of a jury of 96 members . . . cannot be expected." Id. at 3424.

Sen. Austin of Vermont urged the Senate not to deny Judge Ritter a trial before the full Senate "because I believe there is so much doubt about the constitutionality of the resolution." Id. at 3425. Sen. Austin added (id.):

> I am persuaded, after some study, that the Senate cannot by resolution do away with the right of the individual who becomes a respondent in an impeachment proceeding. The Senate might constitutionally waive its rights, but when it undertakes to waive or do away with the rights of a respondent under the law to have that tribunal which is established by the Constitution as the sole tribunal to pass upon the issues upon which hang his honor and his official right, we cannot do it as a matter of practicality, for, as I see it, any respondent charged here with high crimes and misdemeanors, or other cause for impeachment, would be entitled, without question, to come into this distinguished court and offer all the same witnesses who had been examined outside the presence of the court.

In response to Sen. Austin's remarks, Sen. Ashurst described Rule XI as a consent-based procedure, clearly indicating that a committee would not conduct the trial unless the respondent agreed to that procedure. Sen. Ashurst stated that the committee arrangement might "simplify the work" of an impeachment trial, but only "if and when the respondent was willing thus to have the testimony taken by a committee and the managers also were thus willing." Id. at 3426 (emphasis added). Perhaps because of this limitation on

Rule XI, Judge Ritter's trial was conducted on the floor of the Senate, like all previous impeachment trials.

In recent years, the Senate has ignored this limitation on Rule XI, perhaps because the history of Rule XI has been neglected. Judge Harry Claiborne in 1986, and Judge Alcee Hastings and Judge Nixon this year, all have been ordered to undergo trial by committee, which is directly contrary to the intent of the Senate when it approved Rule XI. We urge the Senate to return to its original intent in adopting rule XI, and recognize that it may not compel an impeachment respondent to submit to trial by committee.

II.

THE CONSTITUTION REQUIRES TRIAL BEFORE THE FULL SENATE

The Constitution provides that the "President, Vice President and all civil Officers of the United States [including federal judges] shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." Art. II, § 4. The Constitution includes few procedural requirements for impeachments, but they are very clear (Art. I, § 3, cl. 6):

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation . . . . And no Person shall be convicted without the Concurrence of two-thirds of the Members present.

The question here is whether the requirement that the Senate "try all Impeachments" bars the use of a committee including fewer than one-eighth of its members to receive all evidence and hear all testimony. The Constitution's prohibition against this shortcut is established by: (A) the text of the Constitution; and (B) the plain intent of the Framers.

A. The Constitutional Text

The key constitutional provision states that the Senate shall have the power to "try all Impeachments." That requirement bars the Senate from shunting to a committee of twelve the actual receiving of evidence. Under Rule XI as now implemented by the Senate, the full Senate no longer "tries" the case, but simply votes on it based on a committee report, much like any piece of legislation.

By using the term "try," the Framers directed the Senate to conduct the entire trial process, including the taking of evidence and the hearing of testimony. This conclusion is based on the ordinary meaning of the word. Black's Law Dictionary defines "try" ((4th Ed. 1957), p. 1685):

> To examine judicially; to examine and investigate a controversy, by the legal method called 'trial,' for the purpose of determining the issues it involves.

That understanding of the term has not changed over time. A dictionary printed in 1780 defined "to try" as, inter alia, "to examine as a judge; to bring before a judicial tribunal." T. Sheriden, A Dictionary Of The English Language (1780).

Leading constitutional scholars have agreed that the constitutional text requires trial before the full Senate. Prof. Charles Black has written, "The Senate is to 'try' all impeachments, not simply vote on them; the word 'try' is a word used almost invariably with regard to judicial trials." C. Black, Impeachment: A Handbook 10 (1974). Prof. Black concluded that Rule XI "is of dubious constitutionality, in view of the language confiding to 'the Senate,' and not to some part of the Senate, the 'sole Power to try all Impeachments." Id. at 12. Raoul Berger has agreed, writing that "a shift of the Senate's hearing function to a master [or Committee] is of doubtful constitutionality." R. Berger, Impeachment: The Constitutional Problems, 173 (1973).

The other impeachment provisions confirm this conclusion. When Senators are "sitting for that Purpose [of trying impeachments], they shall be on Oath or Affirmation." This provision treats the senators as impeachment jurors by placing them under oath, and certainly contemplates that the "sitting" Senators will be "trying" the case, not merely voting on the outcome based on a committee report. The Constitution also states that "When the President of the United States is tried, the Chief Justice shall preside." (Emphasis added.) Again, the understanding is clear that the trial itself will occur in the Senate, with the Chief Justice presiding in presidential impeachments. Surely the Framers did not intend the Chief Justice to preside over a committee hearing.

Finally, this conclusion is further reinforced by comparing the Senate impeachment provisions to the other grants of power to Congress. Article I, § 8 gives Congress the "Power to lay and collect taxes," "to regulate Commerce," and the like. Congress exercises these powers through legislative votes, but the Constitution is silent as to what procedures Congress uses to develop legislation. Congress may use committees to develop legislation, or may act as a committee of the whole. Similarly, Article I, § 2, cl. 5 grants the House of Representatives "the sole Power of Impeachment," leaving to the House the choice of investigating impeachments by committee or as a body; the Constitution is indifferent as to the procedures used. And Article I, § 5 charges that each House "shall be the Judge of the Elections, Returns and Qualifications of its own members," leaving each House free to "judge" those matters (under constitutional criteria) based on whatever record, compiled in whatever manner, that the House or Senate may deem fit.

But the Senate impeachment clause contains the specific procedural prescription that the Senate shall "try all Impeachments," leaving no room for delegation of that duty to some fraction of its membership. Had the Framers intended to give such discretion to the Senate, they would have granted the Senate power merely to "convict," or to "judge," or to vote on them.

B. The Intent Of The Framers

The Framers were familiar with impeachment as an essential weapon of Parliament in its struggles with the British monarchy. R. Berger, Impeachment: The Constitutional Problems (1973) p. 30. Indeed, as the Constitutional Convention was convened, Parliament was embroiled in the great impeachment of Warren Hastings, which was cited in the debates. See 2 M. Farrand, Records of the Federal Convention 550 (Sept. 8, 1787) (G. Mason) [hereinafter cited as "Farrand"].

At the Convention, the first formal proposal for an impeachment provision came in the "Virginia Plan" presented in late May 1787, which provided for impeachment trials to be held in the judiciary. 1 Farrand at 22 (Randolph). The "New Jersey Plan," submitted the following month, also called for the courts to hear impeachment trials. 1 Farrand at 241, 244 (June 13, 1787) (Paterson). Alexander Hamilton, representing New York, endorsed impeachment trials in the judiciary. 1 id. at 292-93 (June 18, 1787) (Hamilton).

But the Convention's committee of detail proposed in late July that impeachments be tried "before the Senate and the judges of the federal judicial Court." 2 id. 136, 159 (emphasis added). At that juncture, the Convention's debates reflect general agreement that an impeachment mechanism was needed, see 2 id. at 64 (Wilson), 65 (Mason, Franklin, Gouvernor Morris, Madison), 66 (Gerry), 67 (Randolph), but several delegates favored placing the impeachment trials in the courts. Id. at 66-67 (King; Randolph). The delegates approved including an impeachment provision in the Constitution, but postponed the question of how it should operate.

In late August, the Convention again considered impeachment on John Dickinson's motion that judges be "remove[d] by the Executive on the application (by) the Senate and House of Representatives." 2 Farrand at 428 (Aug. 27, 1787). Gouvernor Morris objected that for judges to be "removed without a trial" would be "arbitrary." Wilson of Pennsylvania and Randolph of Virginia agreed that such a remedy would weaken the independence of judges, 2 id. at 429, and the proposal was defeated.

A week later, another committee of detail proposed the following provision: "The Senate of the United States shall have power to try all impeachments; but no person shall be convicted without the concurrence of two thirds of the Members present." Madison moved four days later for impeachment trials to be heard by the Supreme Court, but his motion was defeated, 9-2. 2 id. at 551 (Sept. 8, 1787). In opposing Madison's motion, Gouvernor Morris argued that "no other tribunal than the Senate could be trusted. The Supreme

Court were too few in number and might be warped or corrupted." Id. (emphasis added).

Providing a "numerous court" of impeachment was important to the Framers, whose system of checks and balances reflected a sophisticated understanding of the fallibility and corruptibility of individuals. Hamilton later explained in the Federalist No. 65 why impeachment trials were committed to the Senate and not the Supreme Court (Federalist Papers No. 65 at 398 (emphasis added)):

> It is much to be doubted whether the members of that tribunal [the Supreme Court] would at all times be endowed with so eminent a portion of fortitude as would be called for in the execution of so difficult a task; and it is still more to be doubted whether they would possess the degree of credit and authority which might, on certain occasions, be indispensable towards reconciling the people to a decision that should happen to clash with an accusation brought by their immediate representatives [the House of Representatives] . . . . The hazard, in both these respects, could only be voided, if at all, by rendering that tribunal more numerous than would consist with a reasonable attention to economy. The necessity of a numerous court for the trial of impeachments is equally dictated by the nature of the proceeding . . . . There will be no jury to stand between the judges who are to pronounce the sentence of the law and the party who is to receive or suffer it. The awful discretion which a court of impeachments must necessarily have to doom to honor or to infamy the most confidential and the most distinguished characters of the community forbids the commitment of the trust to a small number of persons.

See Federalist Papers, No. 79 (Hamilton), at 474 (judges may be impeached by the House "and tried by the Senate").[1]

Thus, the Framers selected the Senate as the forum for impeachment trials because they feared that a smaller tribunal might lack the courage or integrity to withstand the political passions of the day and remain true to its constitutional duty. The Senate was selected for impeachment trials precisely because it is "numerous" -- "more numerous than would consist with a reasonable attention to economy."

In contrast, the constitutional shortcut embraced by Impeachment Rule XI ensures that more than seven-eighths of the Senators will not really know the facts of the case, and then cannot provide sober and careful review of the impeachment case. By exalting the interests of "economy" over the Senate's constitutional duties, Rule XI defeats the Framers' intent that the full "numerous" Senate shall "try all impeachments." The use of a Rule XI Committee shifts the basic decision on impeachment from 100 senators to twelve.

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[1] The debates at the state ratifying conventions provide some further evidence of the Framers' intent that the full Senate conduct the impeachment trial. At the North Carolina convention, Mr. McClaine discussed impeachment of the President, noting, "The House of Representatives is to have the sole power of impeachment and the Senate the sole power of trying," adding that "the Senate [is] a very proper body to try him." 4 J. Elliot, The Debates of the State Conventions 44, 45 (1937) (emphasis added). In the Virginia Convention, George Mason objected to the impeachment provision as inadequate for policing senatorial corruption (3 id. at 402): "The senators were to try themselves. If a majority of them were guilty of the crime, would they pronounce themselves guilty?" And in the Pennsylvania Convention, James Wilson observed that, compared to the House of Representatives, the Senators had three additional powers that might require it to remain in session longer. He described one of those powers as "trying impeachments." 2 id. at 513 (1896) (emphasis added). Each comment reflects the understanding that the full Senate would conduct impeachment trials.

The Framers did not seek to streamline impeachment, but rather to make it burdensome, solemn, and grave. The insistence upon trial before the Senate was rooted in their conviction that liberty cannot be preserved without an independent judiciary, the conviction which also underlies Article III's grant of life tenure and the bar against reduction of judicial compensation. Madison told the Convention that judges should not depend on Congress for reappointment "[b]ecause they might be tempted to cultivate the Legislature, by undue complaisance, and thus render the Legislature the virtual expositor, as well as the maker of the Laws." 2 Farrand at 34.

In the Federalist No. 78, Hamilton expressed these concerns, insisting that life tenure for judges is an "excellent barrier to encroachments and oppressions of the representative body and steady, upright, and impartial adminstration of the laws." Of the three branches of government, he continued, the judiciary "will always be the least dangerous to the political rights of the Constitution," and "all possible care is requisite to enable it to defend itself against [the other branches'] attacks." _Id_.

Hamilton warned that the judiciary "is in continual jeopardy of being overpowered, awed or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security." Id. He concluded (id.):

> If, then, the courts of justice are to be considered as bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

In the very next essay in the Federalist series, Hamilton noted that upon impeachment by the House, judges would be "tried by the Senate," which he called "the only provision on the point which is consistent with the necessary independence of the judicial character." Federalist, No. 79, at 474 (emphasis added). Plainly the notion that impeachment should be streamlined and conducted like other legislative business not only is alien to the intent of the Framers, but also is contrary to their concerns for an independent judiciary. [2]

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[2] One academic writer has pointed out that on three occasions between 1620 and 1624 the House of Lords used committees to hear evidence in impeachment cases. Williams, The Historical and Constitutional Bases for The Senate's Power to Use Makers or Committees to Receive Evidence in Impeachment Trials, 50 N.Y.U. L. Rev. 512, 528-32 (1975). There is no evidence that the Lords used committees in any later impeachment, including the Hastings impeachment that raged during the Constitutional Convention. Indeed, there were at least six impeachment trials in the House of Lords between 1700 and 1780, none of which referred to committees for hearing evidence. Hatsell, Precedents and Proceedings in the House of Commons (1818 ed.). There is no basis in such historic shards and fragments for claiming that the Framers intend impeachment trials to be conducted before Senate committees based on superceded precedents of the House of Lords that were more than 160 years old.

Similarly, Jefferson's "Manual of Parliamentary Practice and Rules of the House of Representatives" provides little support for the committee mechanism. The Manual observes that an impeachment committee could be used to take evidence in the House of Lords, but it is not necessarily authoritative on this point. Jefferson's only citation for that assertion was a 1726 treatise that itself cited as support only a reported case from 1377 concerning late King Edward III's mistress, Alice Pierce, in a proceeding that was not even an impeachment but was a trial on complaint. J. Selden, Judicature In Parliament at 120, 123 (1726). Indeed, Jefferson was in Paris during the Constitutional Convention, and wrote his Parliamentary Manual more than a decade after ratification; accordingly, his knowledge of the Convention was secondhand. His Manual provides weak support for a position contrary to the constitutional text and the plain intent of the Framers, and which was not implemented by the Senate until 199 years after the Convention.

III.

A FAIR IMPEACHMENT TRIAL IS NOT POSSIBLE WHEN SEVEN-EIGHTHS OF THE DECISION-MAKERS DO NOT HEAR THE EVIDENCE

The constitutional shortcut achieved by Rule XI cannot, as a practical matter, be considered adequate compliance with the constitutional command that the Senate "try all Impeachments." The twelve committee members likely will control the outcome of the case. According to a member of Claiborne's Rule XI committee, that committee "exerted tremendous influence on the Senate's ultimate decision." McConnell, supra, 76 Ky. L.J. 739, 750 (1987-88).

The result of Rule XI, therefore, is to reduce the number of effective decision-makers to the twelve committee members. But Article I, § 3, cl. 6 expressly directs that the Senate may convict in an impeachment only upon a two-thirds vote. The Rule XI procedure prevents the respondent from making his case directly to eighty-eight senators, even though he needs only thirty-four votes in order to defeat impeachment. Rule XI thereby effectively denies him a fair opportunity to oppose the Articles of Impeachment.

The inadequacy of committee hearings in impeachment cases was explained by several senators during the Claiborne debate. As Sen. Levin stated (132 Cong. Rec. S 16823 (Oct. 16, 1986) (daily ed.)):

> [I]t was not adequate to let the Senate make findings in those disputed areas where witness demeanor or credibility is critical to the process of determining what the facts are. The Senate, as a finder of fact, did not hear or see a single witness. And, as a result, our ability to fairly reach decisions, when the facts were in dispute, was restricted.
>
> * * * *
>
> When we voted not to hear any additional witnesses, we set up a process which made it impossible for the Senate, as the finder of fact, to fully and fairly evaluate the credibility of witnesses.

Sen. Bingaman complained that the full Senate, without hearing the witnesses, could not make an independent determination of Judge Claiborne's state-of-mind concerning the allegations against him (id., S 15762 (Sen. Bingaman)):

> To make that type of independent determination of his state of mind, I believe it would be essential to hear witnesses and judge the credibility of those witnesses. For the Senate to convict . . . , the Senate must conduct itself as a factfinding body and cannot delegate that responsibility to a special committee. In my opinion, putting the record of evidence presented to the committee into the possession of all Senators is not an adequate substitute for Senators hearing the witnesses present their case.

His concerns were echoed by Sen. Evans (id. at S 16821):

> In a matter of this gravity it is wholly right and proper that we avail ourselves of all resources which might assist us in

> reasoned deliberations. Yet, in this case we chose to make do with incomplete information and a nonstandard of review. Although all 100 of us sat in judgment, only a chosen few heard testimony or examined witnesses.
>
> . . . . An incomplete record is flatly insufficient as a basis for a final decision. But we voted not to have the full Senate hear witnesses or have an opportunity to question the accused.

There is no other fact-finding proceeding in our system of justice in which Nixon could be compelled to submit his case to jurors who do not hear the evidence. If Nixon were injured walking on the sidewalk, he would be entitled to a jury trial on a claim against the landowner, and the jurors would have to attend the trial and hear the witnesses. It makes no sense for one of the gravest proceedings in our polity to be the only proceeding decided by jurors who have not heard the witnesses.

These concerns are heightened here because the allegations against Nixon turn in large part on the credibility of witnesses. The two main witnesses against Nixon present difficult credibility issues. Wiley Fairchild has recanted critical parts of his trial testimony, explaining that he gave false testimony to curry favor with the prosecutor. Nixon v. United States, 703 F. Supp. 538, 552-53 (S.D. Miss. 1988), appeal pending, No. 89-4127 (5th Cir., argued on June 5, 1989). Bud Holmes was indicted on five counts of perjury and pled guilty to contempt of court in the form of making false statements to the grand jury. Holmes admitted that he lied to the grand jury on three separate occasions and that he indicted Drew Fairchild, Wiley's son, in order to pressure Drew to pay legal fees to Bill Porter, Holmes' good friend. United States v. Nixon, No. 85-00012(L) (S.D. Miss.) Trial Tr. at 837-44. In House testimony last July, Holmes repudiated both a sworn affidavit he had signed four months earlier, and sworn deposition testimony he gave in a civil lawsuit in 1987. House Hearings, supra, at 310-15.

In such situations, the courts have recognized that demeanor evidence is critical. E.g., Universal Camera Corp., 340 U.S. 474, 495-96 (1951); United States v. Nelson, 476 F.2d 254, 256 (9th Cir. 1973); NLRB v. Dinion Coil Co., 201 F.2d 484 (2d Cir. 1952) (Frank, J.). As Judge Jerome Frank has written (J. Frank, Law and the Modern Mind 109 (1930)):

> [Judges] have called attention, as of the gravest importance, to such facts as the tone of voice in which a witness's statement is made, the hesitation or readiness with which his answers are given, the look of the witness, his carriage, his evidences of surprise, his gestures, his zeal, his bearing, his expression, his yawns, the use of his eyes, his furtive or meaning glances, or his shrugs, the pitch of his voice, his self-possession or embarrassment, his air of candor or of seeming levity.

Credibility inferences based on demeanor evidence can be very subjective, as every judge or juror brings to bear his own experiences and knowledge of life. Nixon will be denied a trial by the Senate if eighty-eight senators are never in a position to gauge the credibility of the witnesses or observe their demeanor.

Finally, the use of a Rule XI committee announces to the senators and the nation a message that is fundamentally at odds with the constitutional scheme: that impeachment is a routine matter, to be shunted off to committee and completed with the least possible disruption to the real business of the Senate. That message encourages senators to rely on hearsay accounts in the press or on staff summaries, or to follow the vote of a respected colleague on the committee.

Again from a practical standpoint, this approach leaves the impeachment respondent with a sharply reduced likelihood of success. Articles of Impeachment are received from the House of Representatives with a presumption of their substance. As Hamilton wrote in Federalist No. 65, it takes great "credit and authority" for a decision-maker to "clash with an accusation brought" by the House of Representatives. If the impeachment respondent cannot even be heard by many of the senators, then the impeachment trial is transformed from a grave confrontation of the branches of government to a bureaucratized bit of legislative business to be completed with the least possible fuss.

In correspondence to the committee, we have estimated that the evidentiary portion of the case likely could be completed in eight full hearing days. That is not an unreasonable demand on the Senate's time, and compares favorably to the five weeks consumed by Judge Archbald's impeachment trial in 1912, or to the eleven weeks devoted to President Johnson's impeachment trial.

The suggestion that the Framers did not envision such a large body sitting as an impeachment jury is unpersuasive. The growth of the Union was an article of faith for the Framers, many of whom speculated in Western lands. Judge Swayne was tried in 1903 before 90 senators, while Judges Archbald in 1912, Judge Louderback in 1933 and Judge Ritter in 1935 were tried before 96 senators. A trial before the full Senate is entirely feasible.

CONCLUSION

The Senate must recognize that an impeachment trial cannot be treated as a bother, or an unwelcome diversion from its more important duties. Impeachment trials are part of the Senate's special constitutional responsibilities. The Senate surely has other duties that are as important as trying impeachments, but it has none that, under the Constitution, are more important.

For all of the foregoing reasons, the trial in this case must be held before the full Senate.

Respectfully submitted,

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Date:

IN THE SENATE OF THE UNITED STATES
Sitting As A Court Of Impeachment

In re)
)
IMPEACHMENT OF)
JUDGE WALTER L. NIXON, JR.)

MOTION OF JUDGE WALTER L. NIXON, JR. FOR DEFENSE FUNDS

Judge Walter L. Nixon, Jr. moves that the Senate provide funds for the costs of his defense of the Articles of Impeachment now pending against him. In support of this Motion, Nixon states the following:

1. He has incurred more than $400,000 in legal expenses contesting the unfounded criminal charges against him. The expense of defending the impeachment proceeding is also high, and is now approaching $100,000. Although Nixon has been selling his assets to pay those debts, he currently owes more than $200,000 in legal expenses. As the debts continue to mount, he faces the real possibility of having to sell his home while still attempting to support his wife and 11-year-old daughter.

2. The impeachment proceeding will involve considerable further expense. The Senate proceedings are likely to consume from 500 to 1,000 hours of attorney time, plus additional expenses. The "incidental" expenses can be very

high; for example, the cost of copying Nixon's defense memoranda for the 38 members of the House Committee on the Judiciary and for the House Subcommittee on Civil and Constitutional rights cost thousands of dollars.

3. Nixon is _not_ asking for reimbursement of the costs of contesting the criminal charges, but only for payment of legal expenses in connection with the impeachment process. Such a course is supported by several important public policies.

> _First_, it is central to the independence of the judiciary that a judge have adequate resources to defend against an impeachment. The independence of the judiciary would be compromised if the Congress could simply bulldoze a federal judge off the bench by creating greater defense costs than the judge could meet without pauperizing himself;
>
> _Second_, Article III of the Constitution guarantees that the compensation of a federal judge will not be reduced during his tenure. The costs of resisting impeachment are a surcharge on income which effectively reduces judicial compensation;
>
> _Third_, the House Managers have had essentially unlimited resources in preparing their case. They

have employed up to four special counsel to assist them, and have had additional support staff, including investigators from other agencies. Simple fairness requires that Nixon have adequate resources.

Fourth, the Senate can be confident that the record established during the trial is complete, and that its judgment is based on the true facts, only if both sides have a full and adequate opportunity to prepare and present their cases.

4. Accordingly, Nixon requests that the Senate instruct the Secretary of the Senate to pay all reasonable out-of-pocket expenses incurred by Nixon in defending against the impeachment allegations. We also ask that the Senate instruct the Secretary of the Senate to reimburse Nixon for legal services devoted to opposing the Articles of Impeachment, at a rate of $75 per hour.

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IN THE SENATE OF THE UNITED STATES
Sitting As A Court of Impeachment

In re)
IMPEACHMENT OF)
JUDGE WALTER L. NIXON, JR.)

JUDGE NIXON'S MOTION TO DISMISS IMPEACHMENT ARTICLE III

Judge Walter L. Nixon, Jr., through his undersigned counsel, hereby moves for an order of the Senate dismissing Impeachment Article III, on the grounds stated:

1. The allegations that an impeachable offense has been made out if "Judge Nixon has raised substantial doubt as to his judicial integrity, undermined confidence in the integrity and impartiality of the judiciary, betrayed the trust of the people of the United States, . . . and brought disrepute on the Federal courts and the administration of justice by the federal courts . . . ."

   These allegations do not make out an impeachable offense under Article II, sec. 4 of the Constitution.

2. Specifications III(2)(A), (D), (E), (F) and (G), which are redundant and multiplicitous of allegations in Impeachment Article I and II.

3. The Article, which charges five different offenses for each of fourteen specific events, thus present seventy allegations. Such a complex and confusing Article is both unfair and completely unworkable.

Respectfully submitted,

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IN THE SENATE OF THE UNITED STATES
Sitting As A Court of Impeachment

In re)
IMPEACHMENT OF)
JUDGE WALTER L. NIXON, JR.)

MEMORANDUM IN SUPPORT OF JUDGE NIXON'S MOTION TO DISMISS IMPEACHMENT ARTICLE III

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Impeachment Article III uses three unfair tricks to try to ensure a conviction in this case. First, it charges Judge Nixon with a variety of vague offenses that are not impeachable offenses under Article II, § 4 of the Constitution. Second, it includes numerous redundant allegations, thereby forcing Judge Nixon to defend against the same allegations over and over. Third, it lumps together fourteen supposedly improper actions by Nixon, making it nearly impossible for Nixon to defend against it or for a Senator to make sense out of it.

Because of these inadequacies in Impeachment Article III, the Senate should dismiss both major portions of it and the entire Article itself. [1]

I.

WHAT IS IN IMPEACHMENT ARTICLE III?

Impeachment Article III has four main parts. The first paragraph recites that Judge Nixon, as a federal judge, must "uphold the integrity of the judiciary, . . . avoid impropriety and the appearance of impropriety, and . . . obey the laws of the United States."

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[1] There is precedent for revision of an impeachment article in these circumstances. During the Louderback impeachment in 1933, counsel for Judge Louderback objected to Impeachment Article V, and the House Managers substantially revised Article V to meet his objections. See 76 Cong. Rec. 5475 (Mar. 3, 1933); 77 Cong. Rec. 1883 (Apr. 18, 1933); 77 Cong. Rec. 4085-86 (May 24, 1933).

The theory of Impeachment Article III is then announced in the second paragraph, which accuses Judge Nixon of doing five subjectively bad things:

> [i] Judge Nixon has raised substantial doubt as to his judicial integrity, [ii] undermined confidence in the integrity and impartiality of the judiciary, [iii] betrayed the trust of the people of the United States, [iv] disobeyed the laws of the United States and [v] brought disrepute on the Federal courts and the administration of justice by the Federal courts . . .

Then the Article asserts that Judge Nixon had conversations about the Drew Fairchild case with Wiley Fairchild, Carroll Ingram, and Bud Holmes. The Article does not directly allege that there was anything wrong with those conversations, but accuses him of concealing the conversations in an interview with federal agents on April 19, 1984 and in his grand jury testimony on July 18, 1984. The Article specifies seven supposedly false or misleading statements during the April interview (Subparagraph (1)) and seven supposedly false or misleading statements before the grand jury (Subparagraph (2)). Five of the specified statements in Subparagraph (2) duplicate allegations in Impeachment Articles I and II; [other specifications in Impeachment Article III overlap each other].

By charging Judge Nixon with five offenses in connection with each of the fourteen specifications, Impeachment Article III alleges seventy supposedly impeachable offenses.

II.

IMPEACHABLE OFFENSES CANNOT INCLUDE SUBJECTIVE ALLEGATIONS OF BAD CONDUCT

The Constitution states that a judge may be impeached for "treason, bribery, or other high crimes and misdemeanors." Under that provision, an impeachable offense may be only (i) a judge's abuse of office or (ii) grave criminal acts.

Impeachment Article III does not primarily accuse Judge Nixon of abuse of office or a grave crime, but rather alleges vague and subjective offenses. Specifically, no impeachable offense is stated by four of the central allegations, that Judge Nixon:

-- "has raised substantial doubt as to his judicial integrity"

-- "undermined confidence in the integrity and impartiality of the judiciary"

-- "betrayed the trust of the people of the United States"

-- "brought disrepute on the Federal courts and the administration of justice by the federal courts." [2]

The invalidity of these subjective elements of Impeachment Article III is clear from the Constitution and its history. By limiting impeachable offenses to "treason, bribery, or other high crimes and misdemeanors," the Framers intended to restrict the impeachment power to specific and defined offenses, which included only abuse of office or grave crimes, not Article III's hodgepodge of emotion-charged allegations.

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[2] We agree that, as a matter of constitutional law, the allegation that Nixon "disobeyed the laws of the United States" could state an impeachable offense.

Our challenge to the subjective elements of Article III is strongly reinforced by the constitutional values at stake. The independence of the federal judiciary requires that a judge be impeached only for specific and definite acts. Because the Article is standardless, it encompasses almost any act that the political majority may find offensive or distasteful, thereby exposing a judge to impeachment for controversial acts or conduct. This standardless approach makes the vote on impeachment a referendum of Congressional disapproval rather than the judicial trial intended by the Framers. The Constitution requires a trial.

Finally, dismissal of the subjective elements of Impeachment Article III will sharply focus the issues for the Senate trial, and therefore should shorten the trial. For all of these reasons, the Senate should dismiss the subjective elements of Impeachment Article III.

A. The Constitutional Limits On An Impeachable Offense

Article II, § 4 of the Constitution defines impeachable offenses as "treason, bribery, or other high crimes and misdemeanors." Treason and bribery -- which are not involved in this case -- have fairly precise definitions. Treason is defined in the Constitution: "Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving aid to them." Constitution, Article III, § 3. Bribery is both a concrete act and a federal statutory offense. See 18 U.S.C.A. § 201 (West Supp. 1989). See generally Rotunda, An Essay on the Constitutional Parameters of Federal Impeachment, 76 Ky. L.J. 707, 721 (1987-88); Black, Impeachment: A Handbook 26-27 (1974).

Because the charges in this case are neither bribery nor treason, they must fall within the phrase "high crimes and misdemeanors." Although that phrase seems, on first view, to be quite broad and elastic, the Framers used it to describe a narrow range of offenses, which includes only (i) the abuse of office or (ii) criminal conduct of a grave nature.

> To be impeachable, an act must fall within one of two categories. It must violate some known, established law, be of a grave nature, and involve consequences highly detrimental to the United States. In the alternative, it must involve evil, corrupt, wilful, malicious or gross conduct in the discharge of office to the great detriment of the United States.

Ferrick, Impeaching Federal Judges: A Study of the Constitutional Provisions, 39 Fordham L. Rev. 1, 54-55 (1970-71).

1. The Impeachment Mechanism Was Primarily Intended To Deal With Abuse Of Office

In establishing the grounds for impeachment, the Framers' main concern was abuse of office. James Madison said that a President should be subject to impeachment because he "might pervert his administration into a scheme of peculation or oppression. He might betray his trust to foreign powers." 2 Farrand, The Records of the Federal Convention of 1789 65-66 (1911). Edmund Randolph declared that "[t]he Executive will have great opportunities for abusing his power; particularly in time of war when the military force, and in some respects the public money will be in his hands." Id. at 67. Gouvernor Morris worried that the president "may be bribed by a greater interest to betray his trust; and no one would say that we ought to expose ourselves to the damages of seeing the first Magistrate in foreign pay without being able to guard against it by displacing him." Id. at 68.

These themes were echoed during the state ratifying conventions. James Iredell told the North Carolina convention that "the occasion for the impeachment power's exercise will arise from acts of great injury to the community, and the objects of it may be such as cannot be easily reached by an ordinary tribunal." 4 Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 113 (2d ed. 1836). At the same convention, Governor Johnston stated that impeachment is a mode of trial for "great misdemeanors against the public." 4 Elliot, supra, at 48. Impeachment, therefore, was primarily intended to protect the community from abuse of the public trust and misconduct in office.[3]

2. The Convention Chose Limited Impeachment Powers Rather Than Removal By Address

In selecting a mechanism for the removal of judges, the Framers chose impeachment precisely because it is so limited, and expressly rejected the wide-ranging British system of address for removing judges. This express choice underscores the importance of limiting the grounds for impeachment to maintain the balance among the three branches of government.

In England, the removal of judges by address was established in the Act of Settlement, 12 & 13 Will. 3, c. 2, § 3 (1700), which provided that "Judges Commissions be made Quamdiu se bene gesserint; . . . but upon Address of both Houses of Parliament, it may be lawful to remove them." Parliament could remove a judge by Address by a simple majority vote, without a trial, and there was no limitation whatever on the grounds that could justify an Address. The Framers had firsthand experience with removal by Address, since that system had been adopted by the state constitutions of Maryland, Massachusetts, New Hampshire, and South Carolina. Berger, Impeachment: The Constitutional Problems 145 (1973).

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[3] Many contend that impeachment may be based only to acts performed in an official capacity. See Berger, Impeachment: The Constitutional Problems 193 (1973). We do not argue that impeachment is so limited and agree that private criminal offenses of a grave nature are also impeachable offenses. Accordingly, we do not seek dismissal of Impeachment Articles I and II, which charge a grave crime.

The Framers flatly rejected this method of removing judges. On August 27, 1787, John Dickinson formally proposed a system of Address, suggesting a provision that judges "may be removed by the Executive on the application [by] the Senate and House of Representatives." 2 Farrand, *supra*, at 428. In response, Gouvernor Morris "thought it a contradiction in terms to say that the judges should hold their offices during good behavior, and yet be removable without a trial. Besides it was fundamentally wrong to subject judges to so arbitrary an authority." *Id*. Edmund Randolph agreed that Dickinson's proposal should be defeated "as weakening too much the independence of the Judges." *Id*. at 429. Dickinson's proposal drew but one supporting vote. *Id*.

3. The History Of "High Crimes And Misdemeanors" Describes A Limited Range Of Offenses

The Framers sought to limit impeachment to specific and defined offenses. In early debate over the impeachment provision, Gouvernor Morris agreed that "corruption and some few other offenses to be such as ought to be impeachable," but he argued that such "cases ought to be enumerated and defined." 2 Farrand, supra, at 65. (emphasis added).

Later in the Convention, George Mason and James Madison debated what was an impeachable offense. Seeking to expand the draft impeachment provision, which then included only treason and bribery as impeachable offenses, Mason asked, "Why is the provision restrained to treason and bribery only? Treason as defined in the Constitution will not reach many great and dangerous offenses. [Warren] Hastings [then on trial in Parliament] is not guilty of treason. Attempts to subvert the Constitution may not be treason as above defined." 2 Farrand, supra, at 550. Mason then moved to add "or maladministration" as a grounds for impeachment. Id.

Madison vigorously opposed "maladministration," which he thought would sap the independence of the executive and the judiciary. Madison stated that "[s]o vague a term will be equivalent to a tenure during pleasure of the Senate." Id. Mason then withdrew "maladministration" and substituted "other high crimes and misdemeanors against the State."[4]

This colloquy illustrates the limits of "high crimes and misdemeanors." The Framers intended that the impeachment standard be distinct and definite. A vague term like

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[4] The phrase "other high crimes and misdemeanors against the State" was changed to "other high crimes and misdemeanors against the United States." In its report of September 12, the Committee of Style and Arrangement deleted the words "against the United States." See Fenton, The Scope of Impeachment Power, Nw. U.L. Rev. 719, 730 (1970).

"maladministration" could be abused, resulting in service "at the pleasure of the Senate." Therefore, "high crimes and misdemeanors" was adopted to provide real limits on the impeachment power. See generally Fenton, The Scope of Impeachment Power, 65 Nw. U.L. Rev. 719, 731 (1970).[5]

Those limits were clear in British case law. One authority summarizes those precedents as classing "high crimes and misdemeanors" in the following catagories: misapplication of funds, abuse of official power, neglect of duty, encroachment on or contempt of Parliament's prerogatives, general corruption, betrayals of public trust by exposing the nation's military defenses to significant risks, and pernicious advice to the Crown. Berger, supra, at 70-71. This historical background demonstrates: "(i) when the Framers employed language having a common law meaning it was expected that those terms would be given that meaning; (ii) the Framers thought the phrase had a 'limited', 'technical' meaning." Id. at 71. The offenses in most English impeachments were treason, criminal or corrupt acts, or gross abuse of official powers. Therefore, one scholar has commented, there is little English precedent for impeachment on grounds other than 1) a crime or 2) gross abuse of official duties. Ferrick, supra, at 49.

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[5] Although the Framers thought that "maladministration" was too vague to describe an impeachable offense, the term was still circumscribed by its use in similar contexts. At the time of the Convention, the constitutions of New Jersey, Pennsylvania, and Vermont provided for removal of judges for maladministration. See Berger, supra, at 145. Maladministration was defined in early dictionaries as mismanagement of one's office. See N. Baly, Dictionary (1753); S. Johnson, Dictionary of the English Language (3d ed. 1765); T. Sheridan, A General Dictionary of the English Language (1780). Therefore, although the term was rejected for its vagueness, "maladministration" in fact had discernible limits.

Indeed, in another context the Framers rejected the phrase "high misdemeanors" because it "had a technical meaning too limited." The draft Constitution provided that a fugitive from justice charged with "treason, felony or high misdemeanors" should be returned from the state from which he fled. In the Convention, "the words 'high misdemeanor' were struck out, and 'other crime' inserted, in order to comprehend all proper cases; it being doubtful whether 'high misdemeanor' had a technical meaning too limited." 2 Farrand, supra, at 174, 443. For the impeachment provision, however, the Framers adopted the phrase because of its "limited" "technical meaning."[6]

4. The Independence Of The Judiciary Would Be Threatened By An Expansive View Of An Impeachable Offense

To preserve the independence of the federal judiciary, the Senate must respect the limits on impeachment. "The complete independence of the courts of justice is peculiarly essential in a limited Constitution." The Federalist Papers, No. 78 at 466 (A. Hamilton). The Framers plainly recognized the importance of freeing the judiciary from the other branches of government. James Wilson told the Convention that "the Judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our Government." 2 Farrand, supra, at 429.

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[6] Moreover, the rule of legal construction, ejusdem generis, further limits the impeachable offenses under "high crimes and misdemeanors." Ejusdem generis provides that when a general word follows a number of specific words, the meaning of the general word is restricted to the same class of things described by the specific words. In the present case, the meaning of "high crimes and misdemeanors" therefore is confined to the same group or class of acts as "treason" and "bribery." See Black, supra, at 36-37.

The judiciary's independence is protected by life tenure and the ban on reducing a judge's compensation. As Hamilton wrote:

> If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

The Federalist Papers, No. 78 at 469 (A. Hamilton).

In formulating impeachment as the only limitation on life tenure, the Framers wanted to maintain the independence of the judiciary, while providing for removal if public security required it. Impeachment was a delicate matter, and the Framers proceeded cautiously.

B. The Application Of "Other High Crimes And Misdemeanors" In Earlier Impeachments

There have been fourteen impeachments before this case. Only in the more recent cases have vague and subjective allegations similar to those in Impeachment Article III been included in impeachment articles.[7]

Three impeachments have been based on treason or bribery. One judge was impeached for treason [West Humphreys (1862)], as was a senator [William Blount (1797)]. Secretary of War William Belknap was impeached in 1876 for receiving bribes.

Ten impeachments have been for the "high crime" or "high misdemeanor" of abusing public office. These have included allegations of drunkenness on the bench [Judge John Pickering (1803)], exceeding judicial powers [Pickering; Justice Samuel Chase (1804); Judge James Peck (1830); Judge Charles Swayne (1905); Judge George English (1926); Judge Harold Louderback (1933)], exceeding executive powers [President Andrew Johnson (1868)], and using judicial office for personal profit [Judge Robert Archbald (1912), Judge Halstead Ritter (1936), and Judge Alcee Hastings (1988)]. Three prior impeachments -- of Judge Ritter, Judge Hastings and Judge Harry Claiborne (1986) -- have charged criminal conduct completely unrelated to the conduct of public office.

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[7] Of the fourteen prior impeachments, five have resulted in conviction, three were mooted by resignation, five ended in acquittals and one is pending.

In recent impeachments, however, the House has become enamored of the tactical device of charging the respondent with being a generally bad person who has brought discredit on the judiciary. The first such effort came in the Louderback case, when the last article of impeachment listed a string of bad acts and charged that they were "all to the scandal and disrepute of said court and administration of justice therein." That "catch-all" allegation did not stick; Louderback was acquitted on all counts. Both Judge Ritter and Judge Claiborne, however, were convicted on such "catch-all" articles. Indeed, Ritter was acquitted on all counts except the "catch-all." Both Judges Hastings and Nixon now face similar catch-all articles. The Senate should no longer allow such a blatantly unfair prosecutorial device, and should insist that the constitutional limits on impeachment be observed.

C. The Subjective Elements Of Impeachment Article III Do Not State An Impeachable Offense

1. A Close Examination Of Impeachment Article III

The subjective elements of Impeachment Article III charge vague and undefinable offenses:

> "Judge Nixon has raised substantial doubt as to his judicial integrity;"
>
> "Judge Nixon has . . . undermined confidence in the integrity and impartiality of the judiciary;"
>
> "Judge Nixon has . . . betrayed the trust of the people of the United States;"

> "Judge Nixon has . . . . brought disrepute on the Federal courts and the administration of justice by the Federal courts."

Not one of these allegations constitutes either a crime or an abuse of office.

Rather, these allegations focus upon the general reputation and character of Judge Nixon. Indeed, it might even be argued that Judge Nixon was guilty of bringing "disrepute" on the federal courts when the House approved Impeachment Articles I and II. Because Judge Nixon has been impeached by the House, and was convicted in an unfair trial, is he to be deemed a "bad man" and removed from the federal bench for bringing disrepute on the courts?

The Constitution requires that an impeachable offense be a specific act, and these subjective allegations cannot constitute an impeachable offense.

> The phrase "high Crimes and Misdemeanors" carries another connotation -- that of distinctness of offense. It seems that a charge of high crime or high misdemeanor ought to be a charge of definite act or acts . . . . General lowness and shabbiness ought not to be enough.

Black, supra, at 40 (emphasis in original).

The subjective elements of Impeachment Article III defy constitutional limitations. Almost any unpopular act or judicial decision could raise "substantial doubt as to [one's] judicial integrity, undermine[] confidence in the integrity and impartiality of the judiciary, betray[] the trust of the people of the United States," and bring "disrepute on the Federal courts and the administration of justice by the Federal courts." The only limit to impeachment under these provisions is the imagination. Impeachable offenses could include:

- -- issuing unpopular judicial decisions, such as striking down on constitutional grounds a statute banning desecration of the flag
- -- the youthful indiscretion of smoking marijuana
- -- reckless driving that causes a traffic fatality
- -- being arraigned on charges of driving while intoxicated
- -- any association with disreputable members of the community
- -- openly engaging in an extramarital affair
- -- attending a meeting of the Communist Party
- -- investing with someone who was later convicted of inside trading

All of these acts certainly can "undermine confidence in the integrity and impartiality of the judiciary" or "bring disrepute on the Federal courts and the administration of justice." The subjective elements of Impeachment Article III thus allow impeachment for any act that the majority may find offensive or distasteful. Under this Article, the independence of the judiciary would be compromised. This is contrary to the intent of the Framers:

> The judiciary, . . ., has no influence over either the sword or the purse; no

> direction either of the strength or of the wealth of the society, and can take no active resolution whatever. . . .
>
> This simple view of the matter suggests several important consequences. It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks.

The Federalist Papers, No. 78, at 465-66 (A. Hamilton) (emphasis added).

2. The Subjective Elements Of Impeachment Article III Are Standardless

The subjective elements of Impeachment Article III provide no standards for the Senate to apply when voting on it, or for judges to apply to their conduct. What evidence or facts will a Senator examine to determine whether the courts have been brought into disrepute? Or whether public confidence has been undermined? What standard of proof will he apply to that decision? Beyond a reasonable doubt? Clear and convincing evidence?

In enacting criminal statutes, Congress must establish the boundaries of criminal conduct. "It is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited." Dunn v. United States, 442 U.S. 100, 112 (1979). In United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921), the Supreme Court evaluated a criminal statute which prohibited "wilfully . . . mak[ing] any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." Striking down the law, the Court stated, "Observe that the section forbids no specific or definite act. . . . It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." 255 U.S. at 89 (emphasis added). In a proceeding as important as impeachment, the same principles must apply.

For federal judges, moreover, the subjective elements of Impeachment Article III provide a vague and shifting boundary between permanent tenure and ouster from the federal bench. Such an uncertain boundary must be unsettling, and could further deter prospective judges. Finally, any weakening of judicial independence and tenure only erodes the courts' ability to protect individual rights.

3. A Modest Proposal

We propose a simple test of the subjective elements of Impeachment Article III: Can those allegations be inserted in Article II, § 4 and still preserve the integrity of that Constitution provision? The result is instructive:

> "The President . . . shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, and raising substantial doubt as to his integrity."
>
> "The President . . . shall be removed from Office on Impeachment for, and Conviction of, Treason,

> Bribery, and bringing disrepute on the Federal courts."

As this exercise demonstrates, the subjective elements of Impeachment Article III have no place in the impeachment process and represent a gross expansion of impeachable offenses beyond the intent of the Framers. Dismissing the subjective elements will both restore constitutional limits and streamline this impeachment proceeding.

III.

THE SENATE MUST DISMISS IMPEACHMENT ARTICLE III(2)(A), (D), (E), (F) AND (G) AS MULTIPLICITOUS AND REDUNDANT

Specifications 2(A), (D), (E), (F), and (G) of Impeachment Article III should be dismissed as redundant. Those specifications simply restate the allegations of Impeachment Articles I and II. In response to our Answer, the House Managers concede that these specifications are redundant:

> [T]he House of Representatives agrees that the statement of Respondent set forth in Article I is also the basis for Article III(2)(A), and that the Statements of Respondent set forth in Article II are also the basis for Article III(2)(D), (F) and (G) . . . . [T]he House of Representatives acknowledges that the statements set forth in Articles II and III(2)(E) were each part of the Respondent's response during his grand jury testimony . . .

Replication of the House of Representatives to the Answer of Judge Walter L. Nixon, Jr. to the Articles of Impeachment at 5. Those redundant allegations should be dismissed.

Redundant claims often are dismissed in civil litigation in the interests of clarity and economy. See Fed. R. Civ. P. 12(f); see, e.g., Davidson v. John Deere & Co., 644 F. Supp. 707, 713 (N.D. Ind. 1986); United States v. 18.2 Acres of Land More or Less, 442 F. Supp. 800, 811 (E.D. Cal. 1977); Town of East Troy v. Soo Line Railroad Company, 409 F. Supp 326, 330 (E.D. Wis. 1976). In criminal cases, a prosecutor may not charge the same offense in multiple counts of an indictment. See, e.g., United States v. De la Torre, 634 F.2d 792, 794 (5th Cir. 1981); Gebhard v. United States, 422 F.2d 281, 289-290 (9th Cir. 1970).

Once a judgment has been rendered in any proceeding, the parties involved cannot relitigate the same issue. In the criminal context, this proscription against relitigation is expressed in the double jeopardy clause of the Fifth Amendment. See, e.g., Abney v. United States, 431 U.S. 651 (1977). In the civil context, so long as the parties are the same, relitigation of the same issue is barred by the doctrine of res judicata. See, e.g., Brown v. Felson, 442 U.S. 127 (1979).

In this case, however, Judge Nixon could be acquitted on the first two impeachment articles, but still be convicted on the third article -- on the basis of exactly the same facts that are the basis for the first two articles. Specifications 2(A), (D), (E), (F) and (G) allege no facts different from the facts alleged in Articles I and II. If the Senate acquits Judge Nixon of the allegations on the first two Articles, he should not face liability for the same allegations in Article III(2)(A), (D), (E), (F), and (G). Whether impeachment is viewed as a civil or a criminal proceeding, the result is the same -- the House Managers are entitled to only "one bite at the apple".

Accordingly, this motion to strike the redundant specifications of Impeachment Article should be granted.

IV.

IMPEACHMENT ARTICLE III IS SO COMPLEX AND CONFUSING THAT IT SHOULD BE DISMISSED

Impeachment Article III alleges that Judge Nixon committed five different offenses ("bringing the judiciary into disrepute," etc.), in connection with each of fourteen separate events. The House Managers thereby include seventy different charges in a single article of impeachment. Such a welter of charges in a single Article can only confuse and complicate this trial. The entire Article should be dismissed.

This motion is supported by the ban on "duplicitous" charges in a criminal case. "Duplicity" is the joining of two or more separate and distinct offenses into a single count of an indictment. See, e.g., United States v. UCO Oil

Co., 546 F.2d 833, 835 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977); Kearney, 444 F. Supp. 1290, 1292 (S.D.N.Y. 1978). The vices of a duplicitous count are obvious:

> One vice of duplicity is that a general verdict for a defendant on that count does not reveal whether the jury found him guilty of one crime or not guilty of both. . . . Another vice of duplicity is that a general verdict of guilty does not disclose whether the jury found the defendant guilty of one crime or both . . . . Finally, there is no way of knowing with a general verdict on the separate offenses joined in a single count whether the jury was unanimous with respect to either.

United States v. Starks, 515 F.2d 112, 116-17 (3d Cir. 1975), aff'd sub nom., Abney v. United States, 431 U.S. 65 (1977). The prohibition against duplicity stems from the "Sixth Amendment's guarantee that a defendant be adequately informed of the nature and cause of the accusation and the Fifth Amendment's interdiction against double jeopardy." United States v. Kearney, 444 F. Supp. at 1292. When confronted with a duplicitous indictment, the courts routinely order remedial action, including dismissal. E.g., Starks, 515 F.2d at 116-118; Kearney, 444 F. Supp. at 1295.

The same point has been made, with great force, in impeachment proceedings. During the Louderback case, Senator Bailey of North Carolina condemned the tactical ploy of loading up an impeachment article with a variety of supposed wrongdoing.

> The final article of the articles of impeachment, in my judgment, ought not to have been considered. It was a summary of the four preceding articles, as sort of [a] catchall designed to collect all of the votes of "guilty" in the four preceding articles, and so by accumulation to gather two thirds of the Senate to sustain the impeachment, which could not be sustained on any of the articles or on all four considered separately. . . . This course is prejudiced, and it is to be hoped that it will not be repeated. A respondent ought to be tried upon the articles, and, if acquitted on each, he ought not to be convicted on all of them assembled in one article.

77 Cong. Rec. 4238 (May 26, 1933) (emphasis added).

In this case, the complexity of having seventy offenses in Impeachment Article III effectively destroys Nixon's right to be removed only by a two-thirds vote. For example, a senator might justify a vote for conviction if he determined that Judge Nixon committed only one of the seventy specified offenses. Assume that for each of the seventy alleged offenses, only one Senator is persuaded of Judge Nixon's guilt. If each of those seventy senators votes to convict on that Article, however, there would be 70 Senators voting for conviction. Judge Nixon then would be removed from office even though, had the seventy specifications been voted on separately, there would have been only one vote for conviction on each charge. This clearly unacceptable outcome vividly illustrates the vices of Impeachment Article III.

CONCLUSION

Impeachment Article III is vague, redundant, complex and confusing. It is unfair to Judge Nixon and unworkable for the Senate. It should be dismissed.

Respectfully submitted,

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Date: June 23, 1989

ARTICLE III

"By virtue of his office as a judge of the United States District Court for the Southern District of Mississippi, Judge Nixon is required to uphold the integrity of the judiciary, to avoid impropriety and the appearance of impropriety, and to obey the laws of the United States.

"Judge Nixon has raised substantial doubt as to his judicial integrity, undermined confidence in the integrity and impartiality of the judiciary, betrayed the trust of the people of the United States, disobeyed the laws of the United States and brought disrepute on the Federal courts and the administration of justice by the Federal courts by the following:

"After entering into an oil and gas investment with Wiley Fairchild, Judge Nixon conversed with Wiley Fairchild, Carroll Ingram, and Forrest County District Attorney Paul Holmes concerning the State criminal drug conspiracy prosecution of Drew Fairchild, the son of Wiley Fairchild, and thereafter concealed those conversations as follows:

> (1) Judge Nixon concealed those conversations through one or more material false or misleading statements knowingly made to an attorney from the United States Department of Justice and a special agent of the Federal Bureau of Investigation during an interview of Judge Nixon conducted in Biloxi, Mississippi, on April 19, 1984. The substance of the false or misleading statements included the following:

(A) Judge Nixon never discussed with Wiley Fairchild anything about Wiley's son's case.

(B) Wiley Fairchild never brought up his son's case.

(C) At the time of the interview Judge Nixon had no knowledge of the Drew Fairchild case and did not even know Drew Fairchild existed, except for what the judge previously read in the newspaper and what he learned from the questioners in the interview.

(D) Nothing was done or nothing was ever mentioned about Wiley Fairchild's son.

(E) Judge Nixon had never heard about the Drew Fairchild case, except what he told the questioners in the interview, and certainly had nothing to do with the case.

(F) Judge Nixon had done nothing to influence the Drew Fairchild case.

(G) State prosecutor Paul Holmes never talked to Judge Nixon about the Drew Fairchild case.

(2) Judge Nixon further concealed his conversations with Wiley Fairchild, Paul Holmes, and Carroll Ingram concerning the Drew Fairchild case by knowingly giving one or more material false or misleading statements to a federal grand jury during testimony under oath in Hattiesburg, Mississippi, on July 18, 1984. The substance of the false or misleading statements included the following:

(A) Paul Holmes never discussed the Drew Fairchild case with Judge Nixon.

(B) To the best of his knowledge and recollection, Judge Nixon did not know of any reason he would have met with Wiley Fairchild after the Nixon-Fairchild oil and gas investment was finalized in February 1981.

(C) Judge Nixon gave the grand jury all the information that he had and that he could, and had withheld nothing during his grand jury testimony.

(D) Judge Nixon had nothing whatsoever unofficially to do with the Drew Fairchild criminal case in State court.

(E) Judge Nixon never talked to anyone, including the State prosecutor, about the Drew Fairchild case.

(F) Judge Nixon never had a thing to do with the Drew Fairchild case at all.

(G) Judge Nixon 'never talked to anyone, State or Federal, prosecutor or judge, in any way influence anybody' with respect to the Drew Fairchild case.

"Wherefore, Judge Walter L. Nixon, Jr., is guilty of an impeachable offense and should be removed from office."

And demand that you, the said Walter L. Nixon, Jr., should be put to answer the accusations as set forth in said articles, and that such proceedings, examinations, trials, and judgments might be thereupon had as are agreeable to law and justice.

You, the said Walter L. Nixon, Jr., are therefore hereby summoned to file with the Secretary of the United States Senate, S-208 The Capitol, Washington, D.C., 20510, an answer to the said articles of impeachment no later than the close of business on the 31st day of May, 1989, and thereafter to abide by, obey, and perform such orders, directions, and judgments as the Senate of the United States shall make in the premises according to the Constitution and laws of the United States.

Hereof you are not to fail.

Witness Robert C. Byrd, President pro tempore of the Senate, at Washington, D.C., this 11th day of May, 1989, the two hundred and thirteenth year of the Independence of the United States.

Walter J. Stewart

Walter J. Stewart
Secretary of the Senate

ATTEST: A TRUE COPY

Walter J. Stewart

Secretary of the Senate

IN THE SENATE OF THE UNITED STATES
Sitting As A Court of Impeachment

In re)
)
IMPEACHMENT OF)
JUDGE WALTER L. NIXON, JR.)

THE HOUSE OF REPRESENTATIVES' MOTION TO STRIKE RESPONDENT'S "AFFIRMATIVE DEFENSES" AND EXCLUDE EVIDENCE PERTAINING THERETO

The House of Representatives, through its Managers and counsel, respectfully moves the Senate to strike the purported "affirmative defenses" presented by Respondent, Judge Walter L. Nixon, Jr., in his Answer to the Articles of Impeachment, and to exclude evidence pertaining to:

1. Respondent's claim in his purported "First Affirmative Defense" that he "was targeted for investigation and prosecution by executive officials who vindictively resented his ruling against the government in the Petit Bois Island condemnation case, United States v. 717.42 Acres of Land, (S.D. Miss., 1981)."

2. Respondent's claim in his purported "Second Affirmative Defense" that "the allegations against him were developed by executive officials who improperly coerced and induced witnesses to give false testimony, which false testimony has been knowingly introduced against him, in violation of Due Process of Law."

The grounds for this motion are set forth in the

House's supporting Memorandum, filed herewith.

Respectfully submitted,

The United States
House of Representatives

By Alan I. Baron (PEK)
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Special Counsel

Managers of the House of Representatives

Jack Brooks
Don Edwards
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House Judiciary Committee Staff
Participating in the Impeachment Proceedings

William Jones, General Counsel
Daniel Freeman, Counsel
Catherine A. LeRoy, Counsel
Colleen Kiko, Counsel

IN THE SENATE OF THE UNITED STATES
Sitting As A Court of Impeachment

In re)
)
IMPEACHMENT OF)
WALTER L. NIXON, JR.)

MEMORANDUM IN SUPPORT OF THE HOUSE OF REPRESENTATIVES' MOTION TO STRIKE RESPONDENT'S "AFFIRMATIVE DEFENSES" AND EXCLUDE EVIDENCE PERTAINING THERETO

The House of Representatives, through its Managers and counsel, submits this Memorandum in support of its motion to strike the "affirmative defenses" alleged by Respondent, Judge Walter L. Nixon, Jr., and to exclude evidence pertaining thereto.

In his Answer to the Articles of Impeachment, Judge Nixon raises the following two purported "affirmative defenses:"

1. "As an affirmative defense, Judge Nixon alleges that he was targeted for investigation by executive officials who vindictively resented his ruling against the government in the Petit Bois Island condemnation case, United States v. 717.42 Acres of Land, (S.D.Miss., 1981) . . . .
2. "As an affirmative defense, Judge Nixon alleges that the allegations against him were developed by executive officials who improperly coerced and induced witnesses to give false testimony, which false testimony has been knowingly introduced against him, in violation of Due Process of Law."

These purported "affirmative defenses" are not relevant to the charges in the Impeachment Articles, are insufficient as a matter of law, have been resolved by the judicial branch against Judge Nixon, and even if true as alleged, cannot excuse the misconduct charged in the Articles of Impeachment. Accordingly, the House moves that these "defenses" be stricken and that all evidence pertaining thereto be excluded at trial.

ARGUMENT

I. THE SENATE HAS THE POWER TO LIMIT THE ISSUES AT TRIAL AND EXCLUDE IRRELEVANT EVIDENCE

It is well established that the Senate has the power to limit the scope of the evidence presented in an impeachment trial. Senate Impeachment Rule VII sets out the procedures for deciding questions of evidence, "including questions of relevancy, materiality and redundancy of evidence" during an impeachment trial before the full Senate.[1] Similarly, Rule XI, providing for the appointment

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[1] Rule VII of the Senate Impeachment Rules states in pertinent part:

> . . . And the Presiding Office on the trial may rule on all questions of evidence including, but not limited to, questions of relevancy, materiality, and redundancy of evidence and incidental questions, which

of a committee to take evidence in an impeachment trial, states that the evidence taken by the committee shall be received and considered by the Senate, "subject to the right of the Senate to determine competency, relevancy, and materiality.[2]

> ruling shall stand as the judgment of the Senate, unless some member of the Senate shall ask that a formal vote be taken thereon, in which case it shall be submitted to the Senate for decision without debate; or he may at his option, in the first instance submit any such question to a vote of the Members of the Senate. Upon all such questions the vote shall be taken in accordance with the Standing Rules of the Senate.

[2] Senate Rule XI states, in pertinent part:

> That in the trial of any impeachment the Presiding Officer of the Senate, if the Senate so orders, shall appoint a committee of Senators to receive evidence and take testimony at such times and places as the committee may determine, and for such purpose the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively under the rules of procedure and practice in the Senate when sitting on impeachment trials.
>
> Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed. The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to

In deciding questions of relevancy the standard applied by the Senate has been whether the evidence can fairly be construed to be "within the purport of the articles."[3] On numerous occasions evidence has been rejected by the Senate because it was not relevant to the charges specified in the articles of impeachment.

In the 1868 trial of President Andrew Johnson, the Senate twice rejected evidence of specified instances of conduct which were offered to prove the President's intent where the opponents to the evidence argued that the pleadings had not put in issue whether the particular conduct had occurred.[4] The President was charged in two of the Articles with wrongdoing related to his intent to defeat the tenure-of-civil-office act, and specifically with his alleged improper attempts to replace Edward Stanton as Secretary of the War Department. The House offered evidence of an appointment to the position of Assistant

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> all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

[3] Hinds' Precedents of the House of Representatives (1907), Volume III, Section 2220 [Hinds'].

[4] III Hinds' Sections 2221-2.

Secretary of the Treasury as proof of "the means by which [the respondent] intended to defeat the tenure-of-civil-office act, arguing that the appointment of the Assistant Secretary of the Treasury was for the purpose of facilitating the honoring of illegal requisitions from the War Department. The Senators asked a number of questions concerning the ability of an assistant secretary to honor such requisitions and determined that it was unlikely that an assistant secretary of the Treasury would be able to circumvent a contrary ruling by the Secretary of the Treasury. The evidence concerning the appointment of the Assistant Secretary of the Treasury was then ruled inadmissible.

Later in the same impeachment trial, President Johnson offered evidence that prior to the enactment of the tenure-of-civil-office act, the Cabinet had advised him that the pending bill was unconstitutional. The Managers argued that the pleadings had not put in issue whether or not the President has been so advised by his Cabinet. The Senate rule that the proffered evidence was inadmissible on the question of the President's subsequent intent to violate the act after it has been enacted over the President's veto by the required two-thirds majority of the Congress.[5]

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[5] Id.

Similarly, in the 1905 impeachment trial of Judge Charles Swayne, the Senate determined that proffered evidence was inadmissible because it was not material to the charges set forth in the articles.[6] In that case, both parties agreed that although the respondent had addressed the issue in his Answer, the question of whether attorneys and litigants had been inconvenienced by the Judge's absence from his district was immaterial where the statute on which the article was based stated that a federal judge who resided outside of his district was guilty of a "high misdemeanor."[7]

In the most recent impeachment trial, that of Judge Harry E. Claiborne, the House Managers filed a motion with the Senate requesting that the Senate exclude certain evidence proffered by the respondent on the grounds that it was irrelevant.[8] The evidence to which the House objected addressed the following topics: 1) whether the Federal judiciary participated in a conspiracy to remove Judge Claiborne; 2) whether the persons in the Executive Branch who investigated and prosecuted Judge Claiborne in the prior criminal proceedings had improper motives; 3) whether the testimony of particular witnesses had been improperly influenced; 4) whether Federal agents had unlawfully searched the respondent's home; and 5) the respondent's general character and reputation.

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[6] III Hinds' Section 2223.

[7] III Hinds' Section 2208. For additional decisions on relevancy and materiality in the impeachment trials of Judge James Peck, former Secretary of War Belknap, President Andrew Johnson, and Judge Charles Swayne, see III Hinds' Sections 2284-2293.

[8] Report of the Senate Impeachment Trial Committee, Hearings before the Senate Impeachment Trial Committee, United States Senate, S.Hrg. 99-812 Pt 1, 99th Cong., 2d Sess. (1986) at 486-502.

The Senate Committee appointed pursuant to Rule XI in the Claiborne proceedings expressed concern with regard to the reliability of the record which would be presented to the Senate for judgment. The Committee allowed testimony by various witnesses concerning communications between agents of the Government and impeachment trial witnesses. On the issue of whether certain documents had been photographed by Government agents during an unlawful search of Judge Claiborne's home, documentary evidence only was allowed. A limited number of witnesses were permitted to testify concerning the respondent's character. The other evidence objected to in the Managers' motion was excluded.[9]

Stating the decision of the Rule XI Committee on the motion, the Committee Chairman, Senator Charles Mathias, noted that much of the proffered evidence was irrelevant:

> . . . because our authority as a committee

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[9] Id at 689-92.

> only extends to the record which is created before us, Judge Claiborne will be free to move after we report to the Senate that the Senate require the testimony of additional witnesses. Without trying to cover all of the issues presented by Judge Claiborne's applications for numerous subpoenas, I would like to mention several dominant concerns.
>
> First, with respect to the requested subpoenas for members of the Judiciary, I continue to believe, as I stated on September 10, that Judge Claiborne's allegations of bias or other failings in the judicial branch are not relevant to these impeachment proceedings. As I indicated at that time, we, not members of the judicial branch, will be the sole judges of the facts and the law which are germane to our constitutional responsibilities.
>
> Second, with respect to any deficiencies in the bribery prosecution of Judge Claiborne, those allegations are not relevant to the question of whether he should be removed from office on account of violations of the Internal Revenue laws.[10]

Judge Claiborne's counsel filed motions before the full Senate requesting the Senate to hear the testimony of additional witnesses.[11] The Senate rejected that request, voting favorably on a motion by Senator Dole "that the Senate not hear additional witnesses in this case.[12]

In short, the Senate impeachment rules and decisions in past impeachments confirm the power of the Senate to narrow the issues for trial and exclude irrelevant evidence. The House urges the Senate to exercise that power in this case. Here, in his Answer to the Articles of Impeachment, Respondent raises purported defenses of "vindictive prosecution" and "prosecutorial misconduct" by the Department of Justice. Such "defenses" are not relevant to this impeachment proceeding, and for the reasons cited below the Senate should exclude any proffered evidence pertaining to these "defenses."

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[10] Id. at 690-91 (emphasis added).

[11] The Congressional Impeachment Process and the Judiciary: Documents and materials on the Removal of Federal District Judge Harry E. Claiborne (1987), Volume 5, Doc. No. 45.

[12] 132 Cong. Rec. S15557 (daily ed., Oct. 8, 1986).

II. THE SENATE SHOULD STRIKE THE PURPORTED DEFENSE OF "VINDICTIVE PROSECUTION"

A. Respondent Has Admitted He Has No Proof Supporting His Claim of "Vindictive Prosecution"

During proceedings before the House Subcommittee on Constitutional and Civil Rights, Respondent claimed that he had been unfairly targeted by the Department of Justice because of his ruling in the Petit Bois Island condemnation case. Yet during his presentation before the Subcommittee, Respondent's counsel admitted that there was absolutely no proof that the prosecution and conviction of Respondent was in any way affected by Respondent's ruling against the government in the Petit Bois Island case:

Mr. Baron. Weingarten [the lead Department of Justice trial attorney in Respondent's criminal case] has testified under oath here that what he did in Fairchild investigation and prosecution had no relationship whatsoever to whatever might have happened in the Petit Bois case; you remember his testimony?

Mr. Stewart. That he knows of, sure.

Mr. Baron. Well, since he was controlling the Fairchild case and running the Fairchild case--

Mr. Stewart. That's right, but he doesn't know how Skip Jarvis [an employee of Wiley Fairchild who advised the FBI that there were irregularities in the investment between Wiley Fairchild and Judge Nixon] came upon this information.

Mr. Baron. I'm not talking about Skip Jarvis. I'm asking about the actions of Mr. Weingarten. He has testified under oath that nothing in Petit Bois had anything to do with what he did in the Fairchild investigation.

Mr. Stewart. I think once he got started, that is true to some extent. I am restricted by Rule 6 with respect to other matters that I think he may have overstated.

Mr. Baron. Do you have any proof, rather than speculation --proof--that in fact Weingarten's handling of the Fairchild case was affected consciously by him in terms of Petit Bois, relative to Petit Bois?

Mr. Stewart. I don't think that's what I've been saying, no.

Mr. Baron. I'm just asking whether you have it.

Mr. Stewart. I can't point to that, no.[13]

B. Respondent's Claim of "Vindictive Prosecution" Has Been Resolved Against Him By the Judicial Branch

"Vindictive Prosecution," or unfair targeting of a criminal defendant by law enforcement authorities, is a challenge frequently raised by criminal defendants and resolved by the courts in ensuring that a defendant has been treated fairly. In post-conviction proceedings as part of his motion to vacate his conviction pursuant to 28 U.S.C. Section 2255, Respondent alleged that "the government targeted Nixon for investigation with improper motive and purposes and through improper means, including but not limited to . . . an apparent attempt to undermine a civil judgment [in the Petit Bois Island condemnation case] ordered by Nixon against the federal government.[14]

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[13] Hearings before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, U.S. House of Representatives. 100th Cong., 2nd Session. Serial No. 96 at 131.

As part of his post-conviction motion, Respondent fully described the "speculation" and "inferences" that led him to believe he had been unfairly targeted because of the Petit Bois Island ruling.[15] Respondent asked for an evidentiary hearing to address, inter alia, his claim of vindictive prosecution. However, Chief Judge John F. Nangle of the Eastern District of Missouri, who presided over the post-conviction proceedings, concluded that Respondent's allegations were insufficient to warrant setting aside the conviction. Judge Nangle noted that Respondent's "initial showing in support of his retaliation theory, when gauged against the legal standards which govern on that theory, was insufficient to warrant discovery or an evidentiary hearing," and termed Judge Nixon's request for discovery concerning Petit Bois Island to be "no more than a fishing expedition."[16]

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[14] Id., Appendix 1 at 1093.

[15] Id., Appendix 1 at 1091-1142.

Significantly, Respondent did not appeal the District Court's determination that he had failed to establish his claim of retaliatory prosecution as a consequence of the Petit Bois Island ruling. As Respondent noted in his brief on appeal to the Fifth Circuit Court of Appeals, "[w]e do not press on appeal the claims of selective prosecution, vindictive prosecution, Jencks Act violations, and perjury trap." Brief at 17, fn. 4 (emphasis supplied). The question of "vindictive prosecution" has been finally resolved against Judge Nixon, with no appeal. Respondent should therefore be estopped from pursuing the matter further.

The House submits that the issue of "vindictive prosecution" is peculiarly suited for judicial resolution and should not be adjudicated by the Senate. Judge Nixon has conceded the wisdom and finality of the District Court's post-conviction ruling that his claim of retaliation is without merit. Principles of separation of powers dictate that the Senate not interfere with this judicial decision on a legal question that the courts have historically addressed and are best suited to handle. Moreover, Respondent's

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[16] Nixon v. United States, 703 F.Supp. 538 at 567 and n. 16, and at 569 (S.D. Miss. 1988). A copy of Judge Nangle's opinion is attached to this Memorandum for the Senate's convenience.

"vindictive prosecution" claim goes only to the validity of criminal convictions that the Senate has no power to set aside, not the Impeachment Articles, which differ from Respondent's criminal charges and were brought by the House, not the Department of Justice. Respondent has not and cannot claim that the Articles are the product of "vindictiveness" by the House due to the Petit Bois Island case. Accordingly, Respondent's "defense" of "vindictive prosecution" has no place in the Senate impeachment proceedings.

C. The Claim of "Vindictive Prosecution" Has No Bearing on Whether Judge Nixon Is Guilty of the Acts Charged in the Articles of Impeachment

Even if Respondent's claim of "vindictive prosecution" were true as alleged, such behavior by the Department of Justice would not affect the Impeachment Articles. Respondent has been charged by the House with having engaged in specific conduct, particularly the giving of false or misleading statements to a grand jury and law enforcement officials, that warrants his removal from office. Judge Nixon, not the Department of Justice, faces trial by the Senate. Misbehavior by the Department of Justice, even if true as alleged, would not excuse the misconduct by Judge Nixon set forth in the Impeachment Articles.

III. THE SENATE SHOULD STRIKE THE PURPORTED DEFENSE OF PROSECUTORIAL MISCONDUCT

Much of the foregoing analysis applies with equal force to Respondent's second "affirmative defense," in which he claims that the "allegations against him were developed by executive officials who improperly coerced and induced witnesses to give false testimony . . . in violation of Due Process of Law."

Again, this defense raises a question--"due process" in connection with Judge Nixon's criminal trial--that is the peculiar province of the judiciary. The courts of this country have historically handled, and are best equipped to handle, such legal questions as alleged prosecutorial misconduct and violations of due process. Prosecutors are officers of the court and, as such, are subject to judicial scrutiny and, where appropriate, discipline or sanctions that may include reversal of a conviction.

Indeed, such judicial review of the conduct of the prosecution took place in Respondent's case. Respondent's claim of prosecutorial misconduct through "coercion" of witnesses was directly raised and resolved against Respondent by Chief Judge Nangle.[17] This specific issue is currently on appeal to the Fifth Circuit Court of Appeals and should be left to the judicial branch, particularly since it challenges not the Articles of Impeachment, but the fairness of Respondent's criminal trial, a question the Senate has no power to address.

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[17] Nixon v. United States, 703 F.Supp. 538 (S.D. Miss 1988).

Respondent's claim of prosecutorial misconduct simply has no bearing on the Impeachment Articles. Respondent fails to appreciate that it is the House of Representatives, not the Department of Justice, which brings these Impeachment Articles. The Articles were voted upon by the House after an independent investigation that included seven full days of testimony from the important witnesses and more than one hundred exhibits. The House does not ask the Senate to simply rubber-stamp the jury verdict without considering evidence. Indeed, Respondent faces charges in Article III that were not the subject of his criminal trial.

Finally, as is the case with his claim of "vindictive prosecution," misbehavior by the Department of Justice in "coercing" witnesses, even if true as alleged, cannot excuse Respondent's misconduct charged in the Articles of Impeachment. Whether the Department of Justice improperly "coerced" witnesses as alleged is simply of no moment in determining whether Respondent is guilty of the charges raised by the House in the Articles of Impeachment.

CONCLUSION

The "affirmative defenses" of "vindictive prosecution" and prosecutorial misconduct alleged by Respondent are a clear effort to distract the Senate from focusing upon Respondent's own conduct before the grand jury and during his April 1984 interview. Respondent, not the Department of Justice, has been charged with impeachable conduct. Respondent, not the Department of Justice, faces trial concerning his fitness to hold public office. Respondent's "affirmative defense" are questions for the judiciary that have been resolved against Respondent, and, even if true as alleged, these "defenses" cannot excuse Respondent's misconduct at issue before the Senate.

WHEREFORE, for the foregoing reasons, the House urges the Senate to strike Respondent's "affirmative defenses" and to exclude evidence pertaining to Respondent's claims of "vindictive prosecution" and prosecutorial misconduct.

Respectfully submitted,

The United States
House of Representatives

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IN THE SENATE OF THE UNITED STATES
Sitting As A Court of Impeachment

In re)
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IMPEACHMENT OF)
JUDGE WALTER L. NIXON, JR.)

THE HOUSE OF REPRESENTATIVES' PROPOSED STIPULATION OF FACTS

The House of Representatives, through its Managers, proposes that the parties stipulate to the following facts:

I. Background to the Senate Proceedings

1. Walter L. Nixon, Jr., was appointed a United States District Judge for the Southern District of Mississippi in 1968.

2. Judge Nixon was designated Chief Judge of the United States District Court for the Southern District of Mississippi in 1982.

3. As a judge for the U.S. District Court for the Southern District of Mississippi, Judge Nixon had chambers and heard cases in Biloxi, Hattiesburg, Meridian, Vicksburg and Jackson, Mississippi.

4. On August 29, 1985, Judge Nixon was indicted by a special grand jury sitting in Hattiesburg, Mississippi on one count of accepting an illegal gratuity in violation of 18 U.S.C. Section 201(g), and three counts of making false declarations before the grand jury, a form of perjury, in violation of 18 U.S.C. Section 1623.

5. On February 9, 1986, following a two-week trial presided over by Judge James H. Meredith of the Eastern District of Missouri, and after deliberating for 18 hours, a federal petit jury sitting in Hattiesburg, Mississippi unanimously convicted Judge Nixon of two perjury counts, while acquitting him of the illegal gratuity charge and the remaining perjury count.

6. On March 31, 1986, Judge Meredith denied post-trial motions for acquittal and a new trial by Judge Nixon.

7. On March 31, 1986, Judge Meredith sentenced Judge Nixon to five years imprisonment on each of the two perjury counts on which he had been convicted, with the sentences to run concurrently.

8. Judge Nixon was released on his own recognizance pending appeal of his convictions.

9. On September 24, 1986, while his appeal was pending, the Supreme Court of Mississippi suspended Judge Nixon's license to practice law in that State, finding that perjury is a felony involving "dishonesty, misrepresentation and deceit" warranting suspension of his professional license.

10. Judge Nixon has also been suspended from the practice of law in Louisiana.

11. On April 30, 1987, the Fifth Circuit Court of Appeals affirmed Judge Nixon's criminal convictions, and thereafter denied Judge Nixon's petition for rehearing en banc.

12. On January 19, 1988 the United States Supreme Court denied Judge Nixon's petition for a writ of certiorari.

13. On February 11, 1988 the Judicial Council of the Fifth Circuit certified to the Judicial Conference, as provided by 28 U.S.C. Section 372(c)(7)(B), that Judge Nixon had engaged in conduct that might constitute grounds for impeachment.

14. On March 15, 1988, based on the criminal convictions, the Judicial Conference certified and transmitted to the Speaker of the House of Representatives a determination that Judge Nixon's impeachment may be warranted.

15. On March 23, 1988 Judge Nixon began serving his sentence at Eglin Air Force Base Prison Camp in Florida.

16. Judge Nixon relinquished all judicial responsibilities following his indictment in August 1985 and has not heard cases since that date.

17. Judge Nixon refuses to resign and intends to return to the bench if he is not removed from office by the Senate.

18. Judge Nixon has continued to collect his judicial salary, currently $89,500 per year, through the present date.

19. After exhausting his appellate rights, Judge Nixon moved to vacate his criminal conviction and sentence through a petition filed pursuant to 28 U.S.C. Section 2255.

20. An evidentiary hearing on Judge Nixon's motion to vacate his conviction and sentence was held in Jackson, Mississippi on August 29 and 30, 1988.

21. After hearing evidence and argument by the parties, on December 19, 1988 Chief Judge John F. Nangle of the Eastern District of Missouri denied Judge Nixon's motion to vacate his conviction and sentence.

22. Judge Nixon has appealed Chief Judge Nangle's December 19, 1988 ruling to the Fifth Circuit Court of Appeals, and that appeal is now pending.

23. Judge Nixon has moved for reduction of his sentence. That motion was denied by Chief Judge Nangle on May 19, 1989.

24. On March 17, 1988 a resolution calling for Judge Nixon's impeachment was introduced in the House of Representatives.

25. The impeachment resolution was referred to the Committee on the Judiciary of the House of Representatives, and subsequently to the Subcommittee on Civil and Constitutional Rights for investigation.

26. The Subcommittee on Civil and Constitutional Rights heard live testimony from all the major witnesses, including Judge Nixon himself, during seven full days of hearings held in June and July, 1988 and March 1989.

27. Judge Nixon was afforded a full and fair opportunity to present his position concerning the impeachment resolution during proceedings before the Subcommittee.

28. During proceedings before the Subcommittee on Civil and Constitutional Rights, Judge Nixon was afforded the opportunity to make an opening statement, to testify on his own behalf, to cross-examine witnesses without limitation, to inform the Subcommittee of witnesses he believed should be heard, to present oral argument through counsel, and to present written argument.

29. With regard to those statements in his April 1984 interview and July 1984 grand jury testimony that are the subject of Article III of the Articles of Impeachment but that were not the subject of criminal charges, Judge Nixon was afforded, and exercised, an opportunity to present argument to the Subcommittee concerning the truthfulness of these statements.

30. On March 21, 1989, by a vote of 8 to 0, the Subcommittee on Civil and Constitutional Rights voted in favor of H.Res. 87, as amended, containing the three Articles of Impeachment of Judge Nixon currently before the Senate.

31. On April 25, 1989, by a vote of 34 to 0, the Committee on the Judiciary voted in favor of H. Res. 87, as amended, containing the three Articles of Impeachment of Judge Nixon currently before the Senate.

32. On May 16, 1989, by a vote of 417 to 0, the House of Representatives voted in favor of H. Res. 87, as amended, containing the three Articles of Impeachment of Judge Nixon currently before the Senate.

33. Article I deals with Judge Nixon's statement to the grand jury that state prosecutor Bud Holmes never discussed the Drew Fairchild state drug smuggling case with him. This same statement was found by the jury to be false and resulted in Judge Nixon's conviction on one of the perjury counts.

34. Article II deals with Judge Nixon's statement to the grand jury that he had nothing whatsoever, officially or unofficially, to do with Drew Fairchild's case; never talked to anybody, including the State prosecutor, about the case; and never influenced anyone with respect to the case. This statement was also found by the jury to be false and resulted in Judge Nixon's conviction on a second count of perjury.

II. Judge Nixon's Oil and Gas Investment with Wiley Fairchild

35. In February 1979, Judge Nixon approached Carroll Ingram, who was a friend and a Hattiesburg, Mississippi attorney who practiced before him.

36. Feeling hampered by the limitations of his judicial salary and in "dire need" of additional income, Judge Nixon asked Mr. Ingram about the possibility of making an oil investment with one of Mr. Ingram's clients, Hattiesburg oil and construction millionaire Wiley Fairchild.

37. In February 1979 when he first discussed with Carroll Ingram the possibility of an investment with Wiley Fairchild, Judge Nixon did not know Mr. Fairchild closely but knew he was in the construction business.

38. After his initial meeting with Mr. Ingram, Judge Nixon checked on Wiley Fairchild's reputation with Paul H. "Bud" Holmes.

39. Mr. Holmes was a close friend of Judge Nixon's for many years and was District Attorney for Forrest and Perry Counties, Mississippi during the period 1980-1984.

40. In the spring of 1979, Judge Nixon again contacted Mr. Ingram to confirm the Judge's interest in investing with Wiley Fairchild.

41. Thereafter, Judge Nixon called Mr. Ingram several times to check if Mr. Ingram had discussed the Judge's request with Mr. Fairchild.

42. After some hesitation, Mr. Ingram ultimately approached Wiley Fairchild and asked him to put the Judge in a good oil deal.

43. Wiley Fairchild did not offer mineral interests for sale to the general public, but instead purchased oil and gas interests, developed wells and kept the profit for himself and his companies.

44. Judge Nixon knew Wiley Fairchild was not in the business of selling mineral interests to the public.

45. In the summer of 1979, Carroll Ingram told Judge Nixon that he had presented the Judge's request to Wiley Fairchild, and that Mr. Fairchild would be "delighted" to put him in an investment.

46. Wiley Fairchild searched his portfolio of several hundred wells for wells that would be profitable for the Judge.

47. Wiley Fairchild selected partial interests in three wells, two in Mississippi and one in Alabama, to convey to Judge Nixon.

48. Wiley Fairchild selected the wells himself, without any discussion or negotiation with Judge Nixon over the specific wells or the price.

49. Mr. Fairchild was free to pick the wells he wanted, picked three wells that had tested favorably, and could have selected other wells if any of the selected wells tested poorly.

50. By late 1979 Mr. Ingram had advised Judge Nixon of the three specific wells Wiley Fairchild had selected.

51. Judge Nixon contacted Carroll Ingram "a couple of times" in late 1979 to conclude his transaction with Wiley Fairchild, but was told by Mr. Ingram that Wiley Fairchild "is the kind of man you cannot push. He will take his own sweet time."

52. In February or March of 1980, Judge Nixon met with Wiley Fairchild at the office of W.R. Fairchild Construction Co. in Hattiesburg.

53. During his meeting with Judge Nixon in February or March of 1980, Wiley Fairchild told Judge Nixon that he had heard of Judge Nixon, wanted to meet him and that Mr. Ingram had recommended the Judge.

54. During his meeting with Judge Nixon, Wiley Fairchild referred to Judge Nixon as "Judge."

55. During his meeting with Judge Nixon, Wiley Fairchild told Judge Nixon that he had also provided investment opportunities to the Mayor of Hattiesburg and a former Governor of Mississippi.

56. According to Judge Nixon, by the end of the meeting he and Wiley Fairchild had tentatively agreed to enter into an investment, with no negotiation over the price or other terms of the investment.

57. During the year following his meeting with Wiley Fairchild in February or March of 1980, Judge Nixon telephoned Wiley Fairchild occasionally, perhaps more than ten times.

58. In February 1981, draft documents conveying royalty interests in three wells were drawn up at Wiley Fairchild's office by Robert L. "Skip" Jarvis, then a Fairchild employee.

59. The draft conveyances prepared by Mr. Jarvis were dated February 25, 1981.

60. The draft royalty deeds were reviewed by Carroll Ingram, Wiley Fairchild's attorney, and then returned to Mr. Fairchild.

61. During the first week of March 1981, Mr. Jarvis was instructed to prepare new conveyances with increased acreage, and to backdate the conveyances to February 25, 1980.

62. The royalty deeds ultimately executed by Wiley Fairchild and Judge Nixon state that the conveyances are "to be effective from the first day of production."

63. The royalty deeds convey to Judge Nixon part of the interests owned by W.R. Fairchild Construction Co., Ltd. in two wells, and part of the interest owned by Fairchild-Windham Exploration Company in the third well.

64. As part of his transaction with Wiley Fairchild, Judge Nixon executed three promissory notes through which he agreed to pay W.R. Fairchild Construction Co. a total of $9500.00 at 10% interest, due and payable by February 25, 1983.

65. The promissory notes purport to be executed on February 25, 1980, but were not actually signed by Judge Nixon until more than a year later.

66. It was not until 1984, after Judge Nixon was aware that federal law enforcement authorities were investigating the Nixon-Fairchild transaction and more than a year after he had repaid all other principal and interest owed to Fairchild Construction Company, that Judge Nixon paid backdated interest for the period 1980-1981.

67. The Nixon-Fairchild investment was financed entirely through the promissory notes, such that Judge Nixon paid no out-of-pocket cash in connection with the investment.

68. The promissory notes were not recorded on the books of Fairchild Construction Company until the spring of 1982, after Judge Nixon received royalty payments and began to pay off the notes.

69. On February 20, 1981, during the same period when he was consummating his investment with Wiley Fairchild, Judge Nixon financed another oil investment with a third party by borrowing $10,000 from The Mississippi Bank, repayable within 90 days, at 15 percent interest.

70. Although Judge Nixon contends that his agreement with Wiley Fairchild was legally binding in 1980, Judge Nixon failed to report the transaction on his 1980 Financial Disclosure Report filed pursuant to 28 U.S.C. App. 1 Section 301, et seq.

71. Judge Nixon reported the Fairchild investment for the first time on his amended 1981 Financial Disclosure Report, filed after his original 1981 Report failed to provide details concerning his oil and gas investments and was returned to the Judge as inadequate.

72. Judge Nixon met again with Wiley Fairchild in the late spring of 1981 after the royalty deeds had been delivered to Judge Nixon.

73. At the meeting in the late spring of 1981, Judge Nixon told Mr. Fairchild of his desire to generate additional income because of the anticipated expense of putting his children through college.

74. At the meeting Judge Nixon thanked Wiley Fairchild for "putting him in a deal" and told Mr. Fairchild, ". . . if I can ever help you, I will and if I can't, I'll just tell you I can't."

75. Judge Nixon began receiving income from his investment with Wiley Fairchild, paid to him through royalty checks from Fairchild Construction Company, in February 1982.

76. By the time of his criminal trial in early 1986, Judge Nixon had received over $60,000 in royalty income from the three wells, which were expected to produce for another 12 to 20 years.

77. By January 24, 1989 Judge Nixon had received over $73,000 from the Fairchild investment, and he continues to receive regular income from the investment as of the present date.

78. Judge Nixon repaid the $9500 to Fairchild Construction Company with interest, but only after receiving royalty payments in greater amounts from Fairchild Construction Company such that he was never out-of-pocket.

79. Judge Nixon repaid much of his $9500 obligation to Fairchild Construction Company in advance of when repayment was due under the terms of the notes.

80. At the time that he pre-paid his debt at 10% interest to Fairchild Construction Company, Judge Nixon owed greater sums to banks at 15% interest, and owed approximately $9,000 on a personal line of credit from First Mississippi National Bank at 18% interest.

81. During 1982 Judge Nixon expressed to Carroll Ingram his desire to enter into additional mineral transactions with Wiley Fairchild.

82. In the fall of 1982 Judge Nixon and Wiley Fairchild briefly discussed the possibility of another investment.

83. Wiley Fairchild considered putting Judge Nixon into a "Board of Education" well in Simpson County, Mississippi and mentioned the deal to Judge Nixon, but did not put the Judge into the deal because the well "turned out to be no good."

84. Judge Nixon was grateful to Wiley Fairchild for providing him with the investment opportunity.

III. Judge Nixon's Handling of Federal Litigation Involving W.R. Fairchild Construction Co.

85. During the period February 1979 through January 1980, while he was consummating his investment with Wiley Fairchild that ultimately resulted in royalty conveyances and a loan from W. R. Fairchild Construction Co. to Judge Nixon, Judge Nixon presided over a civil case, The Boam Co., et al. v. Dependable Insurance Co., et al., in which Fairchild Construction Company was a party.

86. Judge Nixon rendered judgments involving other parties in Boam in February 1979, the same month in which he first met with Carroll Ingram to discuss the possibility of investing with Wiley Fairchild.

87. Judge Nixon ruled on a summary judgment motion in Boam affecting Fairchild Construction Company in August 1979, at about the time he learned from Carroll Ingram that Wiley Fairchild would be "delighted" to put Judge Nixon in an oil deal.

88. Judge Nixon approved a pre-trial settlement in Boam by signing orders in September and October 1979, and dismissed Fairchild Construction Company from the case on January 30, 1980, approximately one month before he met with Wiley Fairchild at the office of W.R. Fairchild Construction Co. in Hattiesburg.

89. At no time during the Boam proceedings did Judge Nixon recuse himself or disclose his dealings with Wiley Fairchild to the parties in the Boam case.

90. In March 1980, at about the time Judge Nixon contends he "definitely" had a firm agreement to enter into an investment with Wiley Fairchild, Judge Nixon assumed responsibility over a second case, Seymour v. L&A Contracting Co., et al., in which W.R. Fairchild Construction Company was a named defendant.

91. In September and December, 1980, Judge Nixon issued summary judgment rulings in Seymour affecting Fairchild Construction Co.

92. On April 16, 1982 Judge Nixon conducted a 30-minute pre-trial conference in the Seymour case with all attorneys present, including counsel for Fairchild

Construction Company. Judge Nixon directed counsel to explore the possibility of settlement, and thereafter a pre-trial settlement was negotiated between counsel and approved by Judge Nixon.

93. By the date of the pre-trial conference in Seymour, Judge Nixon had consummated his investment and $9500 loan with Fairchild Construction Company, had received nearly $7500 in royalties from Fairchild Construction Company, and had made a $5000 payment to Fairchild Construction Company on the loan.

94. As of the date of the Seymour settlement, Judge Nixon had received more than $9500 from his oil investment with Fairchild Construction Company.

95. At no time during the Seymour proceedings did Judge Nixon recuse himself or disclose his financial dealing with Wiley Fairchild and Fairchild Construction Company to the parties in the Seymour case.

96. Judge Nixon had an ethical and legal obligation to recuse himself from the Boam and Seymour cases, or at least to disclose his financial dealings with Mr. Fairchild and Fairchild Construction Company to the parties in the two cases.

IV. The Drew Fairchild Drug Smuggling Case

97. On August 4, 1980, an airplane with 2,200 pounds of marijuana was seized by federal and local drug enforcement agents at the Hattiesburg Municipal Airport. Arrests were made at the scene and on August 19, 1980 an indictment was returned in federal court against three of the smugglers.

98. Drew Fairchild, Wiley Fairchild's 50 year-old son, was a participant in the smuggling conspiracy but was not prosecuted at that time. Drew Fairchild's role in the conspiracy, as manager of the airport, was to give the plane permission to land and refuel so it could reach its final destination.

99. Shortly after the indictment of the smugglers, Drew Fairchild and his lawyer, Bill Porter, approached Forrest County District Attorney Paul H. "Bud" Holmes to discuss Drew's legal situation.

100. Mr. Holmes told Mr. Porter to speak with George

Phillips, United States Attorney for the Southern District of Mississippi, who was overseeing the federal prosecution of the drug case.

101. As a result of discussions with the U.S. Attorney's Office, on November 19, 1980 Drew Fairchild entered into a "Memorandum of Understanding" under which he agreed to plead guilty to felony charges, pay a $15,000 fine, and receive a sentence of 5 years probation in return for cooperating with the government in the drug case.

102. Drew Fairchild was subsequently debriefed by agents working with the U.S. Attorney's Office, who concluded that Drew was not being completely cooperative. The U.S. Attorney's Office determined, therefore, that Drew Fairchild would be prosecuted for his involvement in the drug smuggling conspiracy.

103. In March 1981 Bill Porter sued Drew Fairchild to collect a $10,000 legal fee in connection with his representation of Drew in the drug case.

104. Approximately one quarter of the fee claimed by Bill Porter was paid by Wiley Fairchild on July 3, 1981, but Mr. Porter complained to Bud Holmes about his inability to collect the full fee from Drew.

105. Mr. Holmes thereafter called U.S. Attorney Phillips and offered to take over the case and indict Drew Fairchild on state drug charges. Mr. Phillips agreed to transfer the case to the Forrest County District Attorney's Office.

106. On August 26, 1981 the Forrest County grand jury returned an indictment against Drew Fairchild and Robert Watkins, the pilot in the drug-smuggling conspiracy.

107. Drew Fairchild was arraigned on September 3, 1981 with his attorney, Bill Porter, present. Mr. Porter demanded the remainder of his $10,000 fee "up front." In order to obtain the money, Wiley Fairchild made his son Drew turn over numerous oil leases owned by Drew. Wiley Fairchild then paid Mr. Porter the remainder of the fee.

108. In December 1981 Robert Watkins was apprehended in Florida and proceedings to extradite Mr. Watkins were initiated.

109. Drew Fairchild entered a guilty plea to the Forrest

County drug charges on January 12, 1982. Messrs. Holmes and Porter orally agreed that if Drew cooperated against Robert Watkins, Drew would receive five years probation and a $5,000 fine, with sentencing to occur after the prosecution of Mr. Watkins was completed.

110. Wiley Fairchild believed that with the plea agreement and his fee payment to Mr. Porter, he would be troubled no more by his son's case, which had generated considerable media attention because of Wiley Fairchild's wealth and standing in the Hattiesburg community.

111. Drew Fairchild's sentencing was scheduled for March 19, 1982, but was delayed due to his back surgery.

112. In May 1982 Robert Watkins failed to appear at a scheduled hearing and his bond was revoked.

113. Drew Fairchild's case was continued through the summer of 1982.

114. In October 1982 Mr. Watkins was apprehended in Florida, and extradition proceedings began again.

115. Drew Fairchild's sentencing was continued again in November 1982 because Mr. Watkins had been apprehended.

116. On December 23, 1982, pursuant to a motion prepared at the direction of Forrest County District Attorney Bud Holmes, Drew Fairchild's drug cases was "passed to the file." As a matter of local practice, this meant that Drew's case was put on the inactive list.

117. The passing of Drew Fairchild's case to the file was an unprecedented disposition for a defendant who had pled guilty and was awaiting sentencing.

118. According to Forrest County District Attorney Bud Holmes, by passing Drew Fairchild's case to the files Mr. Holmes intended to sweep the case "under the rug" with no disposition.

119. For Drew Fairchild, having his drug smuggling case passed to the files with no disposition was a better result than under the terms of the plea agreement Mr. Holmes had previously reached with Drew Fairchild's attorney.

120. According to Mr. Holmes, he would not have passed the Drew Fairchild case to the files but for a conversation he had with Judge Nixon and a subsequent telephone call

made from Mr. Holmes' farm involving Judge Nixon, Wiley Fairchild and Mr. Holmes.

121. Drew and Wiley Fairchild were extremely pleased with the passing of the case to the file and believed that Drew's legal problems were finally at an end. This disposition of the case was not requested nor even anticipated by Drew.

122. In early January 1983, Forrest County Circuit Court Judge Dickie McKenzie took office after defeating the incumbent, Judge Jack Weldy, in an election.

123. Judge McKenzie observed that the Drew Fairchild case had been passed to the file, expressed his concern about what had occurred, and the matter was reported in the local news media.

124. Robert Watkins was returned to Hattiesburg and arraigned on January 26, 1983. On that same date, one month after passing the case to the files, Mr. Holmes reinstated the Drew Fairchild case to the active docket.

V. Judge Nixon's Knowledge of and Involvement In Drew Fairchild's Case

125. Drew Fairchild's drug prosecution was a source of embarrassment and humiliation to Wiley Fairchild, who was concerned about his family's reputation.

126. Robert Royals told Wiley Fairchild that Bill Porter had said Wiley should "get off his money" to help Drew, who had his "tail in a crack."

127. Convinced that Bud Holmes and possibly others were blackmailing him in connection with his son's case, Wiley Fairchild sought help from Judge Nixon.

128. Wiley Fairchild specifically wanted Mr. Holmes to take care of his son's case as promised, and sought out Judge Nixon because of the Judge's previous offer of help and because he knew Judge Nixon and Mr. Holmes were very good friends.

129. Judge Nixon visited Wiley Fairchild's office in Hattiesburg for a fifteen or twenty-minute meeting.

At the meeting, Wiley Fairchild told the Judge he was being blackmailed by Mr. Holmes and possibly Carroll Ingram concerning the handling of Drew's drug case. Mr Fairchild emphasized the unfairness of his son's predicament compared to the treatment of Robert Royals. Wiley Fairchild told Judge Nixon, " . . . if they will go ahead and prosecute Bob Royals they won't hear a damn word out of me. He's guilty and my son's guilty, but I just don't like them picking on my son because I got money."

130. During his meeting with Wiley Fairchild, Judge Nixon had the impression that Wiley Fairchild wanted him to speak with Bud Holmes about the Drew Fairchild drug case.

131. On the evening of the day of his meeting with Wiley Fairchild in which Mr. Fairchild complained of being blackmailed in connection with his son's drug case, Judge Nixon met with Forrest County District Attorney Paul "Bud" Holmes at Mr. Holmes' farm outside of Hattiesburg.

132. In conversation with Bud Holmes, Judge Nixon related Wiley Fairchild's complaints of "blackmail" in connection with the handling of the Drew Fairchild drug case.

133. After Judge Nixon described Mr. Fairchild's blackmail complaints, Bud Holmes told Judge Nixon, inter alia, that Drew Fairchild had already agreed to plead guilty and would serve no time in prison under the plea agreement.

134. While at Mr. Holmes' farm, and after speaking with Mr. Holmes about his [Judge Nixon's] meeting earlier that day with Wiley Fairchild, Judge Nixon spoke with Wiley Fairchild on the telephone.

135. In his telephone conversation with Judge Nixon, Wiley Fairchild thanked Judge Nixon for speaking with Mr. Holmes about the handling of Drew Fairchild's case and told Judge Nixon, "I'm satisfied."

136. Bud Holmes has testified that he believes, although he is not certain, that his meeting with Judge Nixon at Mr. Holmes' farm outside Hattiesburg and the subsequent telephone conversation between Judge Nixon and Wiley Fairchild occurred on May 14, 1982.

137. At his criminal trial Judge Nixon denied that he was in Hattiesburg on May 14, 1982. Judge Nixon testified

that he was "positive" that he was in his chambers in Biloxi preparing for an upcoming asbestos case on the afternoon of May 14, 1982.

138. Contrary to his trial testimony, Judge Nixon was in fact in Hattiesburg on May 14, 1982, as established during post-trial proceedings through dental records confirming that the Judge received treatment in Hattiesburg on that date.

VI. The Department of Justice Investigation

139. On November 3, 1983 an anonymous informant telephoned the Federal Bureau of Investigation and suggested that Wiley Fairchild may have conveyed mineral interests to Judge Nixon as a bribe for favorable treatment in Drew Fairchild's drug case.

140. In a series of telephone calls, the informant told the FBI that the mineral interests had been backdated in a way that made it appear that the transfer had taken place before the Hattiesburg drug bust, not after. The caller also claimed that the promissory notes were not produced in the normal course of business, but rather had appeared only after Wiley Fairchild had been challenged by one of his employees on his relationship with Judge Nixon.

141. The informant thereafter identified himself as Robert Jarvis, a former employee of Wiley Fairchild and presently an Assistant States' Attorney in Florida.

142. In the spring of 1984 the Public Integrity Section of the Department of Justice, with the assistance of the FBI, commenced an investigation into Judge Nixon's investment with Wiley Fairchild and the handling of the Drew Fairchild drug case.

143. As part of the investigation, an attorney with the Department of Justice and an FBI agent interviewed Judge Nixon in the Judge's chambers in Biloxi, Mississippi on April 19, 1984.

144. The April 19, 1984 interview of Judge Nixon was tape-recorded with Judge Nixon's full consent.

145. Judge Nixon was advised prior to and during his interview that the investigation was examining Judge Nixon's investment with Wiley Fairchild and the handling of the Drew Fairchild case.

146. At the time of the interview Judge Nixon recalled his meeting with Wiley Fairchild when Mr. Fairchild complained of blackmail in connection with the Drew Fairchild drug case, his meeting with Bud Holmes at Mr. Holmes' farm, and his telephone conversation with Mr. Fairchild while at the farm.

147. At no time during the April 1984 interview did Judge Nixon reveal his meeting with Wiley Fairchild when Mr. Fairchild complained of blackmail in connection with the Drew Fairchild drug case. Nor did Judge Nixon reveal during the interview his meeting with Bud Holmes at Mr. Holmes' farm or his telephone conversation with Mr. Fairchild while at Mr. Holmes' farm.

148. During the April 1984 interview Judge Nixon stated, inter alia, that Forrest County District Attorney Bud Holmes never talked to him about the Drew Fairchild case; that Wiley Fairchild never mentioned his son and never brought up the subject of his son's case; and that Judge Nixon didn't even know Drew Fairchild existed, except for what the Judge previously read in the newspaper and what he learned from the questioners in the interview.

149. Immediately after his April 19, 1984 interview Judge Nixon contacted Bud Holmes on the telephone.

150. In the summer of 1984 a special federal grand jury was empaneled in Hattiesburg to investigate possible criminality associated with the Fairchild-Nixon investment and the handling of the Drew Fairchild drug prosecution.

151. Judge Nixon appeared voluntarily before the grand jury and testified under oath on July 18, 1984.

152. Judge Nixon retained counsel prior to his grand jury appearance and was represented by counsel at the time of his testimony.

153. Prior to his July 1984 grand jury testimony Judge Nixon swore to tell the truth, the whole truth, and nothing but the truth.

154. At the time of Judge Nixon's grand jury appearance, the Department of Justice and the F.B.I. did not know that Wiley Fairchild had spoken with Judge Nixon about being blackmailed in connection with the handling of the Drew Fairchild case, that Judge Nixon had related these complaints to Bud Holmes, or that Judge Nixon had a telephone conversation with Wiley Fairchild from

Holmes' farm regarding the Drew Fairchild case.

155. At the time of his grand jury appearance Judge Nixon recalled his meeting with Wiley Fairchild when Mr. Fairchild complained of blackmail in connection with the Drew Fairchild drug case, his meeting with Bud Holmes at Mr. Holmes' farm, and his telephone conversation with Mr. Fairchild while at the farm. At no time during his grand jury testimony did Judge Nixon reveal his knowledge of these events.

156. During his July 1984 grand jury testimony Judge Nixon denied that Forrest County District Attorney Bud Holmes ever discussed the Drew Fairchild case with him.

157. During his July 1984 grand jury testimony, Judge Nixon responded to the question, "All right. Judge, do you have anything you want to add?" by delivering a statement, prepared in writing by Judge Nixon prior to his grand jury testimony, in which he stated that he "had nothing whatsoever officially or unofficially to do with the Drew Fairchild case in federal court or state court . . . never handled any part of it, never had a thing to do with it at all, and never talked to anyone, state or federal, prosecutor or judge, in any way influence anybody" with respect to the Drew Fairchild case.

158. During his July 1984 grand jury testimony, Judge Nixon told the grand jury that to the best of his knowledge and recollection, he did not know of any reason he would have met with Wiley Fairchild after the Nixon-Fairchild oil and gas investment was finalized in February 1981.

159. During his July 1984 grand jury testimony, Judge Nixon swore that he had given the grand jury all the information that he had and that he could, and had withheld nothing during his grand jury testimony.

160. Judge Nixon deliberately chose not to tell the grand jury about his meeting with Wiley Fairchild when Mr. Fairchild complained of blackmail in connection with the Drew Fairchild case, his meeting with Bud Holmes at Holmes' farm, and his telephone conversation with Wiley Fairchild.

161. On July 19, 1984, the day following his grand jury testimony, Judge Nixon issued a press statement that included the following remarks:

> I have read in the newspapers of a reported

investigation of the handling of state drug cases against Mr. Drew Fairchild and others. The history of these cases can be provided by state authorities. I do not know Mr. Drew Fairchild; I have in no way participated in federal proceedings against other alleged participants with Mr. Drew Fairchild; I have never discussed the Drew Fairchild matter with Wiley Fairchild or any persons associated with the Fairchild companies; I never attempted to influence the handling of any aspect of the case; I have had absolutely nothing to do with any phase of the Drew Fairchild affair.

162. On September 6, 1984, the Hattiesburg grand jury indicted Wiley Fairchild on charges of perjury and paying an illegal gratuity to Judge Nixon. The gratuity count was based upon the royalty payments from Fairchild Construction Company to Judge Nixon.

163. Prior to trial Wiley Fairchild told his attorneys about Judge Nixon's involvement in his son's case. During plea bargain discussions Mr. Fairchild's attorneys made government prosecutors aware for the first time of the meeting with the Judge in which Mr. Fairchild complained of being blackmailed in connection with his son's case and the telephone call between Mr. Fairchild and Judge Nixon while the Judge was at Bud Holmes' farm.

164. On November 26, 1984 Wiley Fairchild pled guilty to the gratuity charge. The perjury count was dismissed as part of the plea bargain, and in September 1985 Mr. Fairchild was sentenced to two months of incarceration, served at a halfway house in Jackson, Mississippi.

165. On November 28, 1984, following the consummation of his plea agreement with the government, Wiley Fairchild appeared again before the Hattiesburg grand jury. Mr. Fairchild admitted he had not been completely honest in his initial grand jury appearance, and told the grand jury about his meeting with Judge Nixon concerning Drew's case, the subsequent telephone call from Bud Holmes' farm, and the passing of Drew Fairchild's case to the files.

166. In February 1985 Judge Nixon met with Bud Holmes in the Judge's car after dark in the parking lot outside the Federal Courthouse in Hattiesburg, and the two men discussed the grand jury investigation and the telephone call to Wiley Fairchild from Mr. Holmes'

farm.

167. In March 1985 Bud Holmes was indicted by the Hattiesburg grand jury on charges of perjury and obstruction of justice that in part alleged he had concealed evidence about the phone call with Wiley Fairchild from Mr. Holmes farm.

168. Bud Holmes' criminal trial began on June 17, 1985. After jury selection Mr. Holmes agreed to plead guilty to a criminal information charging him with contempt, with part of his contemptuous behavior being that he " . . . refused to disclose the substance of the aforementioned telephone call . . . ."

169. Mr. Holmes appeared again before the grand jury following his plea, apologized for covering up his knowledge of the telephone call and told the grand jury of his meeting with Judge Nixon at the farm, the telephone call, and the passing of the Drew Fairchild case to the files. Mr. Holmes was fined $10,000 and sentenced to one year in prison following his guilty plea.

170. The special Hattiesburg federal grand jury investigation also brought to a close the criminal prosecution of Drew Fairchild for his role in the drug smuggling conspiracy. After the passing of the case to the files in December 1982 and the restoration of the case to the active docket in January 1983, the state prosecution of Drew Fairchild had been continued because of delays in the Watkins prosecution until March of 1985. As a consequence of the special federal grand jury investigation into the handling of his case, Drew Fairchild was indicted on federal drug conspiracy charges, pled guilty at arraignment and received a 3-year sentence with all but six months of the sentence suspended. Thereafter Drew Fairchild was also sentenced to 3 years on his state charges, to be served concurrently with his federal sentence. However, as a result of a letter agreement between Drew's counsel and current Forrest County District Attorney Glen White, Drew Fairchild served no time in state prison beyond his federal time served.

171. The Department of Justice also prosecuted Robert Royals, Drew Fairchild's co-manager at the Hattiesburg airport, who had never been prosecuted by Mississippi authorities. Mr. Royals was indicted by the special federal grand jury, convicted and sentenced to three years imprisonment for his role in the drug-smuggling conspiracy.

Respectfully submitted,

The United States
House of Representatives

By Alan I. Baron (PEK)
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Special Counsel

Managers of the House of Representatives

Jack Brooks
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Catherine A. LeRoy, Counsel
Colleen Kiko, Counsel

IN THE SENATE OF THE UNITED STATES
Sitting As a Court of Impeachment

In re)
)
IMPEACHMENT OF)
JUDGE WALTER L. NIXON, JR.)

THE HOUSE OF REPRESENTATIVES' PROPOSED STIPULATIONS REGARDING PRIOR TESTIMONY AND AUTHENTICITY OF EXHIBITS

The House of Representatives, through its Managers and counsel, proposes that the parties stipulate to the following in an effort to ease the trial burden on the Senate Impeachment Committee:

1. Copies of the complete transcripts of Judge Nixon's criminal trial and proceedings before the House Subcommittee on Civil and Constitutional Rights, together with all exhibits offered into evidence during the criminal trial and House Subcommittee proceedings, shall be provided to the Senate Impeachment Committee and made a part of the record in the Senate impeachment proceedings.

2. The parties may refer to the aforementioned testimony and exhibits during the course of the impeachment trial, and may use such materials as they see fit, subject to appropriate objections by the adverse party and rulings by the Senate Impeachment Committee.

3. At their discretion and subject to appropriate objections by the adverse party and rulings by the Senate Impeachment Committee, the parties may call witnesses to testify in person before the Impeachment Committee and may introduce exhibits into evidence, notwithstanding the fact that a witness may have previously testified or an exhibit may have previously been introduced during the criminal trial or House Subcommittee proceedings.

4. All exhibits previously submitted by the parties during proceedings before the Subcommittee on Civil and Constitutional Rights are genuine and authentic. No testimony from a witness shall be necessary to establish the authenticity or genuineness of any record submitted as an exhibit by either party during the Subcommittee proceedings. However, the parties expressly reserve the right to object during the impeachment trial to the introduction of any exhibit, whether or not submitted during the Subcommittee proceedings, on grounds of relevance.

5. The transcript of Judge Nixon's April 19, 1984 interview introduced as an exhibit during the criminal trial and Subcommittee proceedings, with the changes set forth in correspondence dated May 24, 1989 to counsel for Judge Nixon, accurately reflects what transpired during the interview.

Respectfully submitted,

The United States
House of Representatives

By Alan I. Baron (PEK)
Alan I. Baron
Special Counsel

Managers of the House of Representatives

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IN THE SENATE OF THE UNITED STATES
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JUDGE WALTER L. NIXON, JR.)

THE HOUSE OF REPRESENTATIVES' MOTION TO ACCEPT PRIOR TESTIMONY AND EXHIBITS

The House of Representatives, through its Managers and counsel, respectfully moves the Senate, sitting as a court of impeachment, to accept into evidence all prior testimony and exhibits from Respondent's criminal trial, United States v. Walter L. Nixon, Jr., Cr. No. H85-00012(L) (S.D. Miss., Hattiesburg Div.), and from proceedings before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary.

By this Motion, the House does not ask the Senate simply to accept the Subcommittee and criminal trial testimony and exhibits without hearing any live testimony. Rather, the House intends to call key witnesses to testify in person before the Senate Committee, and will introduce the most critical documents as separate exhibits.

But the House does not see the need to exploit the Committee's valuable time by repeating, in toto, an entire two-week criminal trial, or even to duplicate the seven full days of House Subcommittee hearings. Admission of the criminal trial record and Subcommittee record will not prejudice Respondent, since during both the criminal trial and Subcommittee proceedings Respondent was forcefully represented by counsel and afforded full opportunity to cross-examine witnesses, present testimony and introduce exhibits.

If this Motion is granted, the House will distribute to the Committee the criminal trial record and the Subcommittee proceedings in printed volumes prepared by the Government Printing Office. All testimony and exhibits from the trial and Subcommittee hearings, including that presented on behalf of Judge Nixon, will be included in the printed volumes.[1]

With this evidence before it, the Senate Committee will be able to examine, as necessary, the complete prior testimony of key witnesses whose credibility may be at issue; the testimony of minor witnesses whose credibility is not in issue and who need not be summoned to testify in person; and all exhibits heretofore admitted into evidence, however minor. With the permission of the Committee, the House and Respondent will then be able to reserve valuable trial time for the most important evidence, and may refer to the prior record to supplement their presentation at trial and during post-trial briefing.

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[1] The first two volumes of Subcommittee proceedings, consisting of testimony and exhibits from hearings held in June and July 1988, have already been provided to the Committee and Respondent. In his May 24, 1989 letter to Chairman Fowler and Vice Chairman Hatch, counsel for Respondent complained that these volumes were "seriously incomplete and one-sided." Counsel for Respondent failed to understand that the additional documents referred to in his letter were not made a part of the Subcommittee record until March 2, 1989. The volume of the March 2 testimony and exhibits is still in the process of being printed by GPO, and once printed will be provided to the Committee and Respondent. If this motion is granted, the House will also ask GPO to print the criminal trial record and exhibits.

By this motion, the House in no way seeks to interfere with Respondent's right to summon witnesses to testify in person. Rather, the House moves for admission of this material in an effort to focus the parties' live presentations on the seminal testimony and exhibits, save the Committee's valuable trial time, help the Committee create a coherent record and ensure that all relevant materials from the prior proceedings are before the Senate for its consideration and review.

Respectfully submitted,

The United States
House of Representatives

By Alan I. Baron ([illegible])
Alan I. Baron
Special Counsel

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IN THE SENATE OF THE UNITED STATES
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In re)
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IMPEACHMENT OF)
JUDGE WALTER L. NIXON, JR.)

JUDGE NIXON'S MOTION FOR ARGUMENT BEFORE THE FULL SENATE ON THE MOTION TO DISMISS IMPEACHMENT ARTICLE III

Judge Walter L. Nixon, Jr., through his undersigned counsel, hereby moves the Senate to schedule oral argument before the full Senate of his Motion to Dismiss Impeachment Article III, and states the following reasons for granting this Motion:

1. Impeachment Article III suffers from at least three fatal defects: (i) it proposes to remove Judge Nixon from office for actions that are not, under the Constitution, impeachable; (ii) it duplicates charges included in Impeachment Articles I and II; and (iii) by charging Judge Nixon with seventy different impeachable offenses in connection with 14 different events, Impeachment Article III is unfair to Judge Nixon and completely unworkable for the Senate.

2. Because several of the allegations in Impeachment Article III do not appear in the first two impeachment articles, dismissal of Impeachment Article III will simplify and accelerate the trial of this case.

3. The Rule XI Committee lacks power under Impeachment Rule XI to grant a motion to dismiss any impeachment article, but it would be both unfair to Judge Nixon and a waste of the Senate's time to conduct a trial on charges that are inadequate as a matter of law. This point was recognized in the Hastings proceeding, when the respondent's Motion to Dismiss was submitted to the full Senate for decision several months before trial.

For all of the foregoing reasons, the Senate should schedule an opportunity for the motion to dismiss Impeachment Article III to be argued to the Senate for its decision, and that decision should take place before the House Managers and Judge Nixon have to submit their pretrial statements in this case.

Respectfully submitted,

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Date: June 26, 1989

RESPONSES BY PARTIES TO PRETRIAL MOTIONS

IN THE SENATE OF THE UNITED STATES
Sitting As A Court Of Impeachment

In Re
IMPEACHMENT OF
WALTER L. NIXON, JR.

JUDGE NIXON'S OPPOSITION TO THE HOUSE MANAGERS' MOTION TO ACCEPT PRIOR TESTIMONY AND EXHIBITS

The House Managers propose that the Senate "accept into evidence all prior testimony and exhibits from Respondent's criminal trial, . . . and from proceedings before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary." (Emphasis added.) The House Managers seek introduction of such materials regardless of their relevance to the issues in this proceeding.

Judge Nixon objects to this prosecution by avalanche. The course proposed by the House Managers will only complicate the trial and confuse the issues. Equally, there is no need for such an indiscriminate offer of evidence. As Chairman Fowler stated at the organizational meeting on May 16, the purpose of this proceeding is not to prove "how many pounds of documents we can produce." (Tr. at 36).

The most surprising aspect of the House Managers' motion, however, is that it is exactly the opposite of the position the House has taken in the Hastings case. Judge

Hastings has moved to introduce in the Senate the entire record of his original criminal trial. In that case, the House Managers argue for the position we take: [1]

> The House objects to the admission of the entire transcript of the trial proceedings . . . .
>
> As the House has repeatedly stressed, impeachment proceedings are separate and independent from the judicial process. The verdict of a criminal jury is not determinative, for otherwise it would undermine the sole power of the Senate to try all impeachments. In analogous situations, the Senate has recognized this principle and refused to defer to a decision of the courts. Accordingly, the issue of what evidence was presented to the jury is wholly irrelevant.

Consistent with this view, the House Managers in Hastings have sought to introduce transcripts of prior testimony by only those witnesses who are unavailable or whose testimony is technical or uncontradicted. See House Managers' Proposed Use of Prior Testimony, In re Hastings (June 14, 1989).

We urge the Senate to adopt the position taken by the House Managers in Hastings, and not the completely contrary view urged by the House Managers in this proceeding.

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[1] "Amended Final Pretrial Statement of the House of Representatives," In re Impeachment of Judge Alcee L. Hastings, at 14-15 (June 23, 1989) (footnote omitted).

I.

ADMITTING THE COMPLETE PRIOR RECORDS WILL COMPLICATE THE SENATE TRIAL, OBSCURE THE ISSUES AND UNNECESSARILY LENGTHEN THE SENATE'S DELIBERATIONS

The House Managers argue that admission of prior testimony will save time and increase efficiency; in reality it will do just the opposite. The Senate will be flooded with a mountain of undifferentiated documents containing some relevant testimony and much extraneous or irrelevant material. Relevant testimony will be lost in the mire, while the unimportant materials will only prolong the Senate's deliberations.

A. The Issues In This Trial Will Be Blurred

The records of both the criminal trial and the hearings before the House Subcommittee contain an enormous amount of material having little or no relevance to the pending Articles of Impeachment. Judge Nixon was acquitted on two of the criminal counts against him, while the House chose not to impeach on some of the charges that were levelled at Judge Nixon during the House hearings. The amount of testimony relevant to the Articles of Impeachment in the proposed transcripts and exhibits, therefore, is only a fraction of the total testimony contained in these documents. By our Motion In Limine, we have sought to prevent such confusion of the issues in the Senate trial.

If the transcripts of the prior proceedings are admitted, much extraneous and irrelevant testimony will be entered which will obscure the real issues here. For example, one entire day of House Subcommittee hearings was devoted to allegations that Judge Nixon might have violated the Code of Judicial Conduct by his very limited participation in two cases pending before him. After hearing testimony from "experts" on judicial ethics, the House abandoned those allegations and proposed no Articles of Impeachment related to them. What possible reason would the Senate have to study those materials now?

The House Managers evidently are pursuing a strategy of prosecution by avalanche, shoveling into the record any material that might conceivably cast Judge Nixon in a poor light, regardless of its relevance to the Articles of Impeachment. While we have attempted to narrow the issues and limit the burden on the Senate through our Motion In Limine, the House Managers evidently seek to widen the Senate proceeding to include a variety of matters not charged in the Articles of Impeachment.

B. Some Witnesses' Testimony Will Be Hopelessly Confusing

If the entire record of both the criminal trial and the House Subcommittee hearings are admitted into evidence, some witnesses' testimony will be obscured or confused. For the major witnesses, their testimony will appear in at least three different places in the Senate record -- (i) trial testimony, (ii) House testimony, and (iii) Senate committee testimony. If the Senate then calls a witness to testify on the Senate floor under Impeachment Rule XI, that witness will testify four times on the record.

Confusion as to which witness made which statement at which hearing will be rampant. The risk of confusion is not academic in this case. One key witness, Wiley Fairchild, has recanted his trial testimony, saying he lied at trial to curry favor with the prosecutors. Other witnesses have brought out additional relevant points since their testimony at trial. The Senate should hear the full testimony of each relevant witness, but should not be forced to reconstruct the testimony from various previous appearances.

The purpose of the Senate trial is not to create an historically perfect picture of which witness gave which testimony on which day. If a witness testifies differently before the Senate than he has testified before, counsel for either side can confront the witness with the inconsistent testimony. It should not be the Senate's job to sift through hundreds of pages of testimony by the same witness on the same subjects. The Senate must hear and evaluate each witness. Shovelling prior transcripts into the record will only make that job more difficult. [2]

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[2] Strikingly, the House Managers have not proposed to introduce into the Senate record the record of the hearing last August on Judge Nixon's motion for a new trial. At that

II.

THE CONSTITUTIONAL DUTY OF THE SENATE TO TRY IMPEACHMENT CASES REQUIRES THE USE OF LIVE TESTIMONY WHENEVER POSSIBLE

The House Managers argue that the Senate should adopt the records of prior proceedings because there is supposedly no need to repeat the trial process. See House Motion To Accept Prior Testimony And Exhibits, pp. 1-2 (June 23). The Constitution requires that any impeachment proceeding include full trial before the Senate, declaring that the Senate shall "try all Impeachments." Had the Framers of the Constitution felt that conviction in a criminal court were sufficient to support removal from office, they would have provided for automatic removal from office.

The Framers, however, plainly intended the impeachment trial to be independent from the criminal trial in order to afford "the double security intended by a double trial." See The Federalist No. 65, at 428 (Hamilton). That was the conclusion of the Senate in 1986 when it refused to convict Judge Harry Claiborne on Impeachment Article III, which alleged simply that he should be removed from office because

---

hearing, Wiley Fairchild recanted his trial testimony and we revealed much of the prosecutorial misconduct in the prosecution of Judge Nixon. For presumably tactical reasons, the House Managers do not want that evidence in the Senate record and have omitted it from the published House hearings on Judge Nixon's impeachment.

If the Senate accedes to the House Managers' request to introduce these mountains of documents, it certainly must also adopt the transcript and exhibits of the post-trial hearing.

he had been convicted during a criminal trial. We cannot improve on the recent statement of the House Managers in Hastings (supra, p. 2) (emphasis added): "[I]mpeachment proceedings are separate and independent from the judicial process. The verdict of a criminal jury is not determinative . . . . Accordingly, the issue of what evidence was presented to the jury is wholly irrelevant."

Moreover, in this case there is even greater need for a full Senate trial in view of the witness recantations and revelations of prosecutorial overreaching since Judge Nixon's first trial. Because of those intervening developments, it would in fact be misleading for the Senate to attempt to rely upon the records of previous proceedings.

III.

PRIOR TESTIMONY SHOULD NOT BE ACCEPTED WHEN THE WITNESS IS AVAILABLE

Although judicial procedures are not binding on the Senate, they provide important guidance when the Senate sits as a trial court. In all court proceedings -- civil and criminal, state and federal -- prior testimony is generally inadmissible as hearsay, with narrow exceptions when the witness is unavailable to testify. See Federal Rules of Evidence, rules 801-06. In criminal trials, this rule of evidence is constitutionally mandated by the Sixth Amendment. See Ohio v. Roberts, 448 U.S. 56, 64 (1980).

As a proceeding of great constitutional significance, an impeachment trial should include this safeguard against unreliable evidence. When a witness is truly unavailable, prior testimony may be submitted so long as there was an adequate opportunity to cross-examine the witness at the time of the testimony. Otherwise, however, the Senate must respect the universal experience that the best way to arrive at the truth is by hearing the witnesses in person. If a witness is so minor that the House Managers conclude that the Senate need not see or examine that witness, the need for that witness' testimony is doubtful. Testimony worth having is worth having as live testimony before the Senate.

CONCLUSION

To conduct the trial fairly and expeditiously, and to focus upon only relevant matters, this trial must be conducted -- as the Constitution requires -- as a trial, calling available witnesses and using prior testimony only to attack credibility or when a witness is unavailable. The shortcut proposed by the House Managers would be unfair to Judge Nixon and both misleading and ultimately burdensome for the Senate.

For all of these reasons, the House of Representatives Motion to Accept Prior Testimony and Exhibits should be denied. If either party wishes to offer specific witness transcripts for admission into the record, they should be required to do so specifically and to explain why the witness is unavailable to testify.

Respectfully submitted,

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Date: July 7, 1989

IN THE SENATE OF THE UNITED STATES
Sitting As A Court Of Impeachment

In re
IMPEACHMENT OF
WALTER L. NIXON, JR.

JUDGE NIXON'S OPPOSITION TO THE HOUSE MANAGERS' MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES

In moving to strike Judge Nixon's affirmative defenses, the House Managers seek to cover up one of the central elements of this unfortunate case: The Articles of Impeachment charge Judge Nixon with no crime in his financial affairs or his private life, nor of any misuse of his judicial office, but rather with ineptly responding to a federal investigation. In short, the investigation did not discover any supposed crimes or impeachable offenses, but rather produced them. We do not deny the seriousness of the allegation that Judge Nixon gave false testimony, but that allegation must be evaluated in the context of the entire investigation.

The Senate has a constitutional responsibility to hear all evidence concerning prosecutorial misconduct. Judge Nixon's affirmative defenses raise serious doubts about the allegations in the Articles of Impeachment. In both the Claiborne and Hastings impeachment proceedings, the Senate has denied the House Managers' request that the Senate shut its eyes to evidence of prosecutorial misconduct. As in those cases, the Senate must deny the Motion to Strike if it is to afford Judge Nixon the impeachment trial guaranteed by the Constitution.

I.

BACKGROUND

A. Prosecutorial Misconduct

The investigation of Judge Nixon extended for over a year and was plagued with improper leaks and hysterical publicity. At the end, the few convictions primarily involved crimes allegedly committed in responding to the investigation itself. Indeed, four targets of the Hattiesburg Grand Jury were offered deals if only they could give incriminating evidence against Judge Nixon. (The sorry performance of this investigation is detailed in Exhibit 1.) The affirmative defense based upon prosecutorial misconduct focuses on the central witnesses and events in this case:

(i) Wiley Fairchild -- In making its deals with Wiley Fairchild, the government used a series of secret promises, implied promises, nods and winks to induce this frightened man in his 70s to give critical false testimony at trial. Fairchild, who says he "lay awake nights" trying to think up incriminating statements he could make about Judge Nixon, also has admitted that he testified falsely at trial to curry favor with the prosecutor. This admission, and the prosecution's manipulation of Wiley Fairchild, is important to the Senate's view of his testimony and the impeachment articles.

(ii) Paul "Bud" Holmes -- The lead prosecutor told Holmes' lawyer that Holmes did not have to be indicted if he would provide testimony against Judge Nixon. (Dantin Aff. of Feb. 25, 1988, ¶ 2; Holmes Aff. of Feb. 29, 1988, ¶ 5.) When Holmes did not take up this offer, he was indicted on five felony charges; the prosecutor later admitted, however, that he could not prove all of those charges. (Holmes Aff., ¶ 7; Weingarten Aff., May 12, 1988, ¶ 7.) During jury selection at his trial, the government finally got Holmes to strike a deal. The government agreed to dismiss all of the felony charges in return for Holmes' guilty plea to a single charge of contempt of court. Although Holmes already had testified before the grand jury on three occasions, the prosecutor then rushed Holmes into the grand jury to give new testimony against Judge Nixon. The prosecutor told Holmes that he could not receive both a jail term and a fine for contempt of court; despite have made that statement to Holmes, that same prosecutor sat mute in the courtroom while the judge illegally sentenced Holmes to both a fine and a jail term. Because the prosecutor did not correct the District Court's error, Holmes immediately paid the fine and -- thanks to the prosecutor's silence -- beat the prison term. To evaluate Holmes' testimony, the Senate must hear how the government induced him to testify against Judge Nixon in his fourth grand jury appearance.

B. Petit Bois Island

In a condemnation action in 1981, Judge Nixon awarded the private landowners $6.1 million out of the $6.6 million they sought. The government promptly began an investigation of that case through a Tallahassee grand jury, focussing on whether the landowners had presented false testimony during the trial. (Those individuals ultimately were acquitted of those charges.) The lead FBI agent for the Tallahassee investigation (Don Baldwin) was an acquaintance of Skip Jarvis, a native Floridian who became the mysterious informant who falsely accused Judge Nixon of "fixing" the Drew Fairchild case. Both the Petit Bois and the Fairchild investigations were consolidated before the Hattiesburg grand jury. The connections between the two investigations -- and between Jarvis and Agent Baldwin -- have never been fully explored.

II.

THE PROSECUTORIAL MISCONDUCT EVIDENCE MUST BE HEARD

The Constitution provides that the impeachment process is entirely separate from prior judicial proceedings. [1] The Senate must exercise its impeachment power as an independent and coordinate branch of government. Senator Levin underscored this point during the Claiborne impeachment proceedings: "The Constitution gives the Senate the 'sole power' to try impeachments, and it seems clear to all that the Senate's constitutional mandate is to independently evaluate both the disputed and the undisputed facts involved in any case brought before us." 132 Cong. Rec. S16823 (daily ed. Oct. 16, 1986). The Senate may not convict solely on the basis of criminal convictions, nor may it simply adopt certain factual or legal conclusions from judicial proceedings. See Hastings v. United States Senate, C.A. No. 89-1602 (D.D.C., July 5, 1989), slip op. at 9 ("Impeachment proceedings are not to be restricted by principles of double jeopardy any more than a conviction always necessitates impeachment").

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[1] See U.S. Const. Art. I, § 2 [The House "shall have the sole Power of Impeachment"]; U.S. CONST. Art. I, § 3 ["The Senate shall have the sole Power to try all Impeachments."].

The House Managers urge the Senate to exclude evidence of prosecutorial misconduct on the novel theory that prosecutorial misconduct is a question solely for the courts. The House Managers conclude that his specific issue "should be left to the judicial branch." House Managers' Memorandum at 14. This novel theory misunderstands the limited court review of the prosecutorial misconduct issue until now, and flies in the face of the Senate's treatment of the same issue in the *Claiborne* and *Hastings* impeachment proceedings.

First, no court has ever considered the argument we raise by affirmative defense: that prosecutorial misconduct and oppression of the witnesses creates substantial doubt about the key testimony against Judge Nixon. At Judge Nixon's trial, most of the evidence of prosecutorial misconduct had been suppressed by the government. In the pending proceedings on Judge Nixon's Motion for a New Trial, the issue has been whether that misconduct constituted a denial of due process. No court has considered whether the misconduct so weakens the allegations against Judge Nixon that those allegations must be held not proved.

Second, the House Managers ask the Senate to repudiate the view of prosecutorial misconduct issues which the Senate adopted in *Claiborne* and has reaffirmed in *Hastings*. After the Rule XI Committee in *Claiborne* heard evidence on prosecutorial misconduct, the House Managers move to exclude consideration of that evidence. The House Managers in this proceeding, however, seek to prevent even the Rule XI Committee from hearing evidence of prosecutorial misconduct. The Senate in Claiborne specifically allowed testimony from various witnesses concerning communications between government agents and witnesses, which was proffered to show improper influence over the testimony of particular witnesses.

Several senators stressed the relevance of this evidence in the Claiborne case. Senator Levin stated that he "was greatly disturbed by the conduct that the Government was alleged to have exhibited in this case. The evidence clearly suggests that the Government engaged in a pattern of selective prosecution, prosecutorial overreaching, and perhaps intimidation of witnesses and other improprieties." 132 Cong. Rec. S16823 (daily ed. Oct. 16, 1986). Senator McConnell reached a similar conclusion: "I am disturbed by the allegations of prosecutorial misconduct in the case of then Judge Claiborne. I am concerned about the possible overzealousness on the part of Justice Department, strike force, and IRS agents." Id. at S16241 (Oct. 14, 1986).

Senator Bingaman specifically referred to Judge Claiborne's allegations of prosecutorial misconduct: "Judge Claiborne's allegations [of misconduct and abusive targeting by Federal prosecutors] are serious and it is clear from the debate which has taken place here in the Senate that many members are concerned about not only the evidence of overreaching by the Government in this case but other instances of similar overreaching." Id. at S15763 (Oct. 9, 1986). Senator Hatch expressed regret that the Senate did not have the opportunity to study the allegations of Government misconduct: "[T]his body ought to guard against Government overreaching with great care. Where there is even a spectre of this dangerous abuse, we should carefully examine the consequences of that intrusive conduct. This body, too, has the responsibility to stamp out law enforcement abuses. This must not be left to the Judiciary." Id. at S15766 (Oct. 9, 1986) (emphasis added).

The Senate has taken a similar approach in Hastings. The House Managers in that case moved to exclude all questioning of the "motivations" of those who investigated Judge Hastings in 1981 and again in 1983. The Hastings Rule XI Committee denied that motion, so long as the evidence presented concerned whether the "investigations were conducted in a manner intended to mislead a court or trial of fact." Hastings Impeachment Trial Committee, Disposition of Pretrial Issues (April 14, 1989), at 3.

Our affirmative defenses fit squarely within that description. The government pressured witnesses to slant, or even concoct, testimony against Judge Nixon, and those witnesses did precisely that. The weaknesses of the allegations in the impeachment articles cannot be fully appreciated without the evidence of that pressure on the witnesses.

The House Managers claim that Judge Nixon's claim of prosecutorial misconduct is not relevant to the impeachment proceeding. To the contrary, prosecutorial misconduct is plainly "within the purport of the articles." See III Hinds, Precedents of the House of Representatives § 2220 (1907).

Indeed, the government investigation of Judge Nixon is at the heart of the Articles of Impeachment. All three impeachment articles allege that he gave false or misleading testimony before the grand jury in Hattiesburg; Article III also makes similar allegations about his statements to federal investigators in April 1984, before the grand jury was empaneled. The affirmative defenses place before the Senate critical aspects of that investigation, all of which have a direct bearing on whether Judge Nixon truly committed the offenses alleged in the impeachment articles. The Senate cannot responsibly decide the impeachment articles without understanding the investigation during which the supposed offenses occurred.

Finally, the House Managers' Motion to Strike would prevent the "double trial" the Framers envisioned for impeachment cases. Even if the courts had ruled on the affirmative defenses we offer (and they have not so ruled), the Senate could not simply adopt that ruling unthinkingly. Alexander Hamilton considered the substance of the House

Managers' argument in Federalist No. 65, and flatly rejected it:

> [T]he strong bias of one decision would be apt to overrule the influence of any new lights which might be brought to vary the complexion of another decision. . . . [B]y making the same persons judges in both cases, those who might happen to be the objects of prosecution would, in a great measure, be deprived of the double security intended them by a double trial.

We urge the Senate to heed this constitutional intent to provide a "double security," and to heed Senator Evans' warning during the Claiborne impeachment: "The trial of an impeachment is no place for shortcuts or haste. Justice may be elusive, but that is no excuse for a half-hearted try to find it." 132 Cong. Rec. S16822 (daily ed. Oct. 16, 1986).

III.

THE MOTION TO STRIKE THE PETIT BOIS ISLAND AFFIRMATIVE DEFENSE SHOULD BE DENIED

The connection between the Petit Bois Island case and the Fairchild-related allegations against Judge Nixon has never been exposed to light. The evidence of that connection is entirely in the possession of the government, and we have not previously been permitted access to the government's files. Indeed, the District Court's ruling on this allegation on our motion for a new trial was based on little evidence. Having denied Judge Nixon any discovery, the

District Court not surprisingly found that there was insufficient evidence presented to support our allegation.

Last week, for the first time Judge Nixon's representatives began to gain access to the materials that relate directly to the Petit Bois Island allegation. We were granted access to the FBI investigative files, although we did not receive copies of the designated FBI materials until late yesterday and thus have had no opportunity to digest and organize those materials. We also are requesting today the assistance of the Senate in gaining access to Justice Department files on this point as well. Those materials could provide much more information about the Petit Bois Island connection.

When we have had an opportunity to review the documentary material, we may need to conclude our investigation of this matter with a deposition or two on the subject. Similar depositions relating to allegations of prosecutorial misconduct have already been conducted in the Hastings proceeding. Fifth Order, Hastings Impeachment Trial Committee, at 4 (June 8, 1989). We do not request depositions at this time, however.

Accordingly, the Motion to Strike the affirmative defense based on Petit Bois Island is premature. If we cannot present persuasive evidence to support that defense, we do not propose to address it at all during the evidentiary hearing. Until discovery is completed we cannot provide the

Senate with a full picture of what evidence we will have on the subject.

We have continued to pursue this issue because it is of such grave constitutional significance. The possibility that a judge was targeted for federal investigation because he had ruled against the government is a horrifying one. The courts are charged with protecting individual liberty, but such protection will be fatally undermined if a judge risks criminal investigation when he rules against the government. The Senate has a constitutional duty to determine whether that is what happened here.

The Committee should postpone a final ruling on the Petit Bois Island issue until discovery is completed. If we uncover sufficient evidence that we conclude that the matter should be presented to the Senate, the House Managers' objection can be addressed in due course.

CONCLUSION

For all of the foregoing reasons, the House Managers' Motion to Strike should be denied.

Respectfully submitted,

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IN THE SENATE OF THE UNITED STATES
Sitting as a Court of Impeachment

In re)
)
IMPEACHMENT OF)
WALTER L. NIXON, JR.)

THE HOUSE OF REPRESENTATIVES' RESPONSE TO JUDGE NIXON'S MOTION FOR IMMUNITY ORDER

The House of Representatives, through its Managers, and counsel, responds as follows to the Motion for Immunity Order filed by Respondent, Judge Walter L. Nixon, Jr.

The House has no objection to the granting of an immunity order compelling the testimony of a witness with relevant knowledge or information who refuses to testify before the Senate upon claim of privilege against self-incrimination.

But Respondent's motion leaves critical questions unanswered. First, Respondent fails to establish that Robert Royals' testimony is at all relevant to the impeachment proceedings. Respondent apparently believes that Mr. Royals' testimony may have some tangential relevance concerning the date when Judge Nixon spoke on the telephone with Wiley Fairchild concerning the Drew Fairchild case. Yet during the House Subcommittee proceedings, Respondent argued that "the precise date of the conversation . . . is largely irrelevant to whether Judge Nixon made false statements before the grand jury" and that the evidence concerning the date was inconclusive and of "limited significance."[1] If, as Respondent concedes, the subject of Mr. Royals' testimony is "largely irrelevant," there is little reason for the Senate to compel his testimony.

Second, Respondent fails to provide a letter or statement from Mr. Royals indicating that he will decline to testify on claim of privilege. At the time of Judge Nixon's criminal trial 3 1/2 years ago, Mr. Royals apparently spoke freely several times with Judge Nixon's lawyer, but on advice of counsel declined to testify at Respondent's trial. Mr. Royals was at the time serving a prison sentence for his role in the Hattiesburg drug-smuggling conspiracy. At this late date, Mr. Royals may not feel any present threat of self-incrimination if asked to testify before the Senate.

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[1] Judge Walter L. Nixon Impeachment Inquiry, Hearings before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, U.S. House of Representatives, 100th Cong. 2nd Sess., Appendix 1, Serial No. 96 at 1873.

Third, Respondent apparently has not yet decided whether he will call Mr. Royals to testify, although Respondent knows the content of Mr. Royals' testimony. Surely Respondent must at least make a final decision that he wishes to call Mr. Royals as a witness, before the Senate takes the extraordinary step of granting immunity to Mr. Royals.

Respectfully submitted,

The United States
House of Representatives

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IN THE SENATE OF THE UNITED STATES
Sitting as a Court of Impeachment

In re)
)
IMPEACHMENT OF)
WALTER L. NIXON, JR.)

THE HOUSE OF REPRESENTATIVES' RESPONSE TO JUDGE NIXON'S MOTION FOR TRIAL BY THE FULL SENATE

The House of Representatives, through its Managers and counsel, responds as follows to the Motion for Trial By the Full Senate filed by Respondent, Judge Walter L. Nixon, Jr.

In Resolution 128, as in the Claiborne and Hastings impeachments, the Senate has created a committee of twelve Senators to receive evidence pursuant to Senate Impeachment Rule XI. The House believes that the question of how an impeachment case is to be tried is within the sole discretion of the Senate.

The House notes that in pending federal litigation, Hastings and Nixon v. The United States Senate, et al., Civil No. 89-1602-GAG (D.D.C.) both this Respondent and Judge Alcee Hastings have challenged the Senate's decision to receive evidence through a Rule XI Committee. The House concurs with the position of the Senate in the federal

	CHARGES	TESTIFIED BEFORE GRAND JURY	PROSECUTOR'S STATEMENTS RE NIXON	OUTCOME	SENTENCE
WILEY FAIRCHILD	1 count of offering an illegal gratuity 1 count perjury before the grand jury (9/84)	7/18-19/84; 11/28/84	He could make a deal if he gave the prosecutors information about Nixon	Plea bargain for one count of offering illegal gratuity; Gov't recommended no jail time.	Twenty-four months, with all but 2 months suspended; served in halfway house.
JOHN STOCKS	1 count obstruction of justice 3 counts perjury during *Petit Bois* civil trial (10/31/85)	N/A	Offered complete immunity if he would testify that he bribed Nixon in the *Petit Bois* case.	Acquitted	None
EUGENE LEWIS	1 count obstruction of justice 1 count perjury before the grand jury (10/31/85)	5/30/85	Told on October 29, 1985 that he would be indicted unless he had material incriminating information of bribery of Nixon in *Petit Bois* case.	Acquitted	None
PAUL "BUD" HOLMES	4 counts perjury before the grand grand jury 1 count obstruction of justice (3/29/85)	7/20/84; 9/5/84; 2/21/85; 6/28/85	Told on March 27, 1985 that he did not have to be indicted if he filled in the gaps in the investigation, which meant incriminating information about Nixon.	Plea bargain for contempt of court	$10,000 fine, with one year sentence imposed improperly and never served.
WALTER NIXON	1 count accepting illegal gratuity; 3 counts perjury before grand jury (8/29/85)	7/18/84	N/A	Convicted on 2 perjury counts	Two five-year sentences, concurrent.

litigation that the "appointment of a committee to compile an evidentiary record for use at trial is a reasonable and prudent exercise of the Senate's responsibility to try impeachments."[1]

The House Managers are ready to proceed with the impeachment trial of Judge Walter L. Nixon, Jr. either before the full Senate or a Rule XI committee. However, there is ample precedent for using a committee in the pending impeachment proceeding. The practice, which was first considered by the Senate in the beginning of this century, follows English parliamentary practice. In 1904, Senator George F. Hoar of Massachusetts submitted a resolution, considered by unanimous consent and agreed to by the Senate, directing the Senate Committee on Rules to consider and report on "whether the rules [on impeachment] may properly and lawfully provide for taking testimony in such cases by a committee in accordance with the practice of the English House of Lords . . . ." S. Record, 58th Cong., 2d Sess. at 3660.

In 1935, the Senate adopted Rule XI in an effort to balance its constitutional role of acting as a Court of Impeachment with the demands of legislative business. In 1936, the then Chairman of the Senate Judiciary Committee,

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[1] Memorandum in Support of Defendants' Motions to Dismiss Complaint of Plaintiff Alcee L. Hastings, filed by the Senate on June 20, 1989, at 49.

Senator Ashurst of Arizona, explained that the recent impeachment of Judge Louderback

> . . . was dreary, involved and protracted, and that it was not according to public policy to have 96 Senators sit and take testimony. Subsequently, not a dozen, not 20, but at least 40 Senators urged that the Senate Committee on the Judiciary give its attention to the question whether or not a committee appointed by a Presiding Officer could take the testimony in impeachment trials, whereupon a resolution was introduced . . . and was adopted . . . .

80 Cong. Rec. 3424-3425 (1933) (remarks of Senator Ashurst).[2] In 1986, the Senate invoked Rule XI during the impeachment trial of former Judge Harry Claiborne.

The use of a committee by the Senate when sitting as a Court of Impeachment is consistent with the practice of the House of Lords. As explained by Thomas Jefferson in describing English impeachment procedures, "the practice is to swear the witnesses in open house, and then examine them there; or a committee may be named who shall examine them in committee, either on interrogatories agreed on in the House or such as the committee in their discretion shall demand." Constitution, Jefferson's Manual and Rules of the

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[2] See 3 L. Deschler, Deschler's Precedents of the United States House of Representatives, Section 18.6 (1977).

House of Representatives, H.R. Doc. No. 279, 99th Cong., 2d Sess~~., Sec~~tion 614 (1987).[3]

The House Managers are of the view that the appointment of a committee in an impeachment proceeding is a matter within the Senate's sound discretion. The Senate's "sole power to try all Impeachments," established in Article I, Section 3 of the Constitution, includes the power to determine the procedures by which the Senate exercises that authority.

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[3] Parliamentary history establishes that the House of Lords consistently used committees to hear the evidence presented by the House of Commons on a charge of impeachment. For example, as early as 1621, the House of Lords appointed a committee to hear witnesses in the impeachment proceeding of Lord Chancellor Francis Bacon. 2 A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors 1101 (1816). Similarly, in the politically significant impeachment of the Earl of Middlesex in 1624, the House of Lords relied upon a number of committees to take evidence. Id. at 1197.

Following the presentation of evidence by the House of Commons to a committee, the House of Lords would draw up a charge and forward it to the respondent. In the case of Lord Bacon, upon receipt of the charge he confessed and the House of Lords proceeded with judgment and sentencing. E. Foster, The House of Lords 1603-1649 155 (1983). In the case of the Earl of Middlesex, the proceedings continued before the House of Lords. It appears that the testimony taken in committee was read and the Earl of Middlesex was then allowed to respond. Id. at 158-159. He was not allowed the opportunity to re-examine witnesses. Id. At the conclusion of the proceeding the House of Lords found him guilty and sentenced him. Id. See generally Williams, The Historical and Constitutional Bases for the Senate's Power to Use Masters or Committees to Receive Evidence in Impeachment Trials, 50 N.Y.U. L. Rev. 512, 528-532 (1975).

The impeachment of Judge Nixon is of no greater or lesser importance than the past impeachment of Judge Claiborne, or the pending impeachment of Judge Hastings. As in the Claiborne and Hastings impeachments, the House of Representatives determined that this Respondent has engaged in misconduct which violated the public trust, warranting removal from public office. The Senate used Rule XI in the impeachment trial of former Judge Claiborne, and has decided to continue the practice in the Hastings and Nixon impeachments. In the Claiborne impeachment proceedings, the Rule XI Committee received the evidence in a timely manner and developed a full record for the entire Senate.

Respectfully submitted,

The United States
House of Representatives

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IN THE SENATE OF THE UNITED STATES
Sitting as a Court of Impeachment

In re)
)
IMPEACHMENT OF)
WALTER L. NIXON, JR.)

THE HOUSE OF REPRESENTATIVES' RESPONSE TO JUDGE NIXON'S MOTION FOR DEFENSE FUNDS

The House of Representatives, through its Managers and counsel, responds as follows to the Motion for Defense Funds filed by Respondent, Judge Walter L. Nixon, Jr.

By his motion, Judge Nixon alleges that his costs in defending the impeachment proceedings are already approaching $100,000. Respondent seeks reimbursement for past and future expenses incurred in his defense against the Articles of Impeachment.

The House Managers do not take a position as to whether, as a matter within its discretion, the Senate should voluntarily provide funds to Judge Nixon.[1] However, the House feels compelled to respond to certain points raised in Respondent's motion.

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[1] The Senate has never paid an impeached officer's legal costs. Judge Charles Swayne sought reimbursement for his defense costs and expenses following his acquittal on impeachment charges, but the Senate declined to act on his request. 39 Cong. Rec. 3601 (1905). Judge Alcee Hastings also requested payment of his fees and costs in connection with his pending impeachment proceedings. By order dated May 18, 1989, the Hastings Impeachment Trial Committee determined that it would not recommend to the Senate that Judge Hastings' motion for funds be granted. The Committee noted that "Judge Hastings may renew his request for defense

The Constitution does not require the Senate to pay Respondent's legal costs in this impeachment proceeding, as noted by the Senate itself in pending federal litigation involving both Judge Hastings and this Respondent.[2] The House concurs fully with this position.

Respondent asserts that the compensation clause requires the public funding of his defense. However, there is no support for such a view either in the history of the compensation clause itself or in the subsequent case law.

The rationale behind the compensation clause was discussed by Alexander Hamilton in The Federalist, No. 79, 403-405 (M. Beloff ed. 1987):

> Next to permanency in office, nothing can contribute more to the independence of the judges, than a fixed provision for their support . . . .
>
> The precautions for [state judges'] responsibility are comprised in the article

---

funds at the close of the Senate's proceedings on the Articles of Impeachment." In pending litigation, Hastings and Nixon v. The United States Senate, Civil No. 89-1602-GAG, Judge Hastings has sued the Senate to compel payment of funds. The Senate has moved to dismiss this claim.

[2] See Memorandum in Support of Defendant's Motion to Dismiss Complaint of Plaintiff Alcee L. Hastings, at 55-60, filed by the Senate on June 20, 1989 in Hastings and Nixon v. The United States Senate, supra.

> respecting impeachments . . . . This is the only provision on the point, which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own constitution in respect to our own judges.

Thus, Hamilton emphasized the need to insulate the judiciary from pressure from the legislative use of the purse strings, while at the same time, he recognized the need for a mechanism by which the legislature could remove judges for misconduct.

Subsequent judicial interpretation has recognized that the compensation clause was rooted in a long standing Anglo-American tradition of an independent judiciary. However, the courts have also recognized that "indirect, nondiscriminatory diminishments of judicial compensation, those which do not amount to an assault upon the independence of the third branch or any of its members, fall outside the protection of the compensation clause . . . ." Atkins v. United States, 556 F.2d 1028, 1045 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978). "Plaintiffs need to demonstrate the existence of a plan fashioned by the political branches, or at least of gross neglect on their part, ineluctably operating to punish the judges qua judges, or to drive them from office despite the Constitution's guarantee of tenure in office 'during good behavior.'" Id. at 1054.

Thus, in O'Malley v. Woodrough, 307 U.S. 277 (1939), the Supreme Court rejected the notion that the income tax on salaries of judges assuming office after the enactment of that tax violated the compensation clause. The Court reasoned:

> . . . To suggest that [the income tax] makes inroads upon the independence of judges who took office after Congress had thus charged them with the common duties of citizenship, by making them bear their aliquot share of the cost of maintaining the Government, is to trivialize the great historic experience on which the framers based the safeguards of Article III, Sec. 1. To subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering.

Similarly, in United States v. Will, 449 U.S. 200 (1980), the Supreme Court held that the compensation clause was not violated by Congressional repeal or modification of a statutorily defined formula for annual cost-of-living increases in the compensation of judges. See also Atkins v. United States, supra, where the Court of Claims held that the Congressional failure to increase federal judges' salaries in an inflationary period did not violate the compensation cause. Thus, despite the fact that the 'real" value of judicial compensation has been diminished by various factors, since the diminishment was nondiscriminatory and unrelated to the independence of the judiciary, the compensation clause was not offended.

Finally, and more directly on point, Judge Alcee Hastings was rebuffed in his attempts to rely on the compensation clause as a basis for ordering payment of his legal fees incurred in the proceedings under the Judicial Councils Reform and Judicial Disabilities Act of 1980. In Hastings v. Judicial Conference of the United States, et. al., 593 F. Supp. 1371 (1984), the Court held:

> Judge Hastings contends the government's refusal to pay for his legal fees to defend against the disciplinary action diminishes his compensation in office in violation of Article III of the Constitution. Congress, of course, is forbidden by the compensation clause from diminishing directly the salary of federal judges. See United States v. Will, [supra] . . . . An indirect diminution of a judge's disposable income, triggered by that judge's own conduct, is entirely different. See Duplantier v. United States, 606 F.2d 654, 669 (5th Cir. 1979), upholding civil penalty provision of the Ethics in Government Act, 28 U.S.C.A. Sec. 301 et seq., as applied to judges. This claim has no more substance than the contention of judges assigned to duties away from their homes that their compensation is diminished because their per diem allowance does not cover actual necessary expenses.[3]

In Duplantier, a class of federal judges challenged the Ethics in Government Act of 1978 on the grounds, inter alia, that imposition of a civil penalty under the Act would diminish a judge's compensation, in violation of Article III of the Constitution. That court observed that in neither case was there a "'plan fashioned by the political branches . . . ineluctably operating to punish the judges qua judges,'" and emphasized that Congress had imposed precisely the same penalty for failure to file financial reports on Members of Congress and on members of the executive branch. 606 F.2d at 669, quoting Atkins, at 1054. Similarly, in Atkins, the Court of Claims held that a seven-year "freeze" on judicial pay during a period of inflation did not offend the compensation clause. The court explicitly noted that judges were not the only targets of the freeze; numerous other government employees--top executive branch officials and Members of Congress--had been included.

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[3] On appeal, the Court of Appeals did not reach the issue of payment of fees. Hastings v. Judicial Conference of the United States, 770 F.2d 1093 (1985). See, however, concurring opinion, in which Judge Edwards expresses concern about the issue. Id. at 1110-1111.

Likewise, the impeachment process, and the attendant costs incurred by a respondent, are not limited to judges. The President, Vice-President, and civil officer are all liable to impeachment. As with the imposition of taxes and the impact of inflation, judges are part of a larger group subject to the law. "[T]he fact that judges are not alone in that class substantially weakens plaintiffs' allegations of discrimination." Atkins, supra at 1055.

Here, there is no discrimination by a political branch against judges as a class. Indeed, a discriminatory intent is belied by the fact that this impeachment was initiated by a referral from the judicial branch. Moreover, as emphasized in Hastings v. Judicial Council, supra, this case involves an indirect diminution of compensation "triggered by that judge's own conduct." Finally, impeachment itself is not designed to undermine the independence of the Federal judiciary, but rather to preserve the integrity of that branch as required by the Constitution.

In short, the Constitution does not require the Senate to award Respondent his fees and costs. Moreover, the House must point out that Judge Nixon's expenses in connection with the impeachment do not even begin to equal the judicial salary he has continued to receive following his criminal convictions in February 1986, despite the fact that he has been unable to perform his judicial duties. Indeed, the salary Respondent has collected since March 1988, when he entered prison and an impeachment resolution was first introduced in the House, exceeds Respondent's expenses tc date in defending the impeachment charges.

Respectfully submitted,

The United States
House of Representatives

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IN THE SENATE OF THE UNITED STATES
Sitting as a Court of Impeachment

In re)
)
IMPEACHMENT OF)
WALTER L. NIXON, JR.)

THE HOUSE OF REPRESENTATIVES' RESPONSE TO JUDGE NIXON'S MOTION IN LIMINE

The House of Representatives, through its Managers and counsel, responds as follows to the Motion in Limine filed by Respondent, Judge Walter L. Nixon, Jr. In his motion, Respondent urges the Senate to exclude

> "1. All testimony, evidence, or substantive reference to the oil and gas properties that he purchased from Wiley Fairchild; and
>
> 2. All transcripts of testimony from any previous proceeding, except to the extent such transcripts are used to impeach, contradict or refresh the recollection of a witness then testifying, or if the witness whose transcript is offered is unavailable to testify under subpoena."

The House opposes Respondent's motion. Contrary to Respondent's suggestion at p. 1 of his Memorandum in Support of his Motion, exclusion of the above evidence will not promote "economy, efficiency and fairness." Indeed, the reverse is true. Admission, not exclusion, of prior testimony will lead to an efficient and fair trial. Moreover, evidence concerning the oil and gas properties Judge Nixon purchased from Wiley Fairchild is essential to a full understanding of the charges alleged in the Articles of Impeachment.

I. Judge Nixon's Oil and Gas Investment With Wiley Fairchild Is Important and Necessary Evidence To Be Considered by the Senate

It is not surprising that Respondent asks the Senate to exclude testimony concerning his financial relationship with Wiley Fairchild, for that evidence is highly damaging to Respondent. Although the Articles of Impeachment do not seek Judge Nixon's removal from office based on his oil and gas investment with Wiley Fairchild, the Nixon-Fairchild investment is critical background evidence that will allow the Senate to understand why Judge Nixon was interviewed by law enforcement officials in April 1984 and then testified before a special grand jury in the summer of 1984. Most importantly, the oil and gas investment provides indispensable evidence regarding Judge Nixon's motive for making the false statements during the interview and to the grand jury that are specifically charged in the Articles of Impeachment.

The House expects to prove, inter alia, that in February 1979 Respondent, "in dire need" of supplemental income, approached Carroll Ingram, a friend of Respondent's and an attorney who practiced before Respondent, about the possibility of making an investment with one of Mr. Ingram's clients, Hattiesburg oil and construction millionaire Wiley Fairchild. Judge Nixon and Wiley Fairchild ultimately formed a business relationship and consummated a questionable investment that included the following:

1. Although Respondent knew Wiley Fairchild was not in the business of selling mineral interests to the public, he solicited and accepted a lucrative investment from Mr. Fairchild, and received large royalty payments from Mr. Fairchild's construction company, even as he was presiding over federal litigation involving Mr. Fairchild's construction company;

2. Under Respondent's arrangement with Mr. Fairchild, there was no negotiation over the specific wells or price. Instead, Mr. Fairchild selected three wells from his portfolio that tested favorably, and could have substituted other wells if he so desired.

3. Respondent paid nothing out-of-pocket for his royalty interests, but instead executed three notes through which he agreed to pay Mr. Fairchild's construction company $9500 at 10% interest, 5% below the rate Respondent agreed to pay at the same time to a bank to finance another oil and gas investment.

4. The royalty deeds and notes in the Nixon-Fairchild transaction were backdated. The documents purport to be executed on February 25, 1980, but were not actually signed until more than a year later. Mr. Fairchild's son Drew was implicated by federal authorities in a major marijuana smuggling conspiracy in August 1980, before the documents were actually executed.

5. Respondent contends that his investment with Mr. Fairchild was legally binding in February 1980. Yet Respondent failed to include the investment on his 1980 Financial Disclosure Statement, and did not pay interest for the backdated period 1980-81 until after he became aware that federal law enforcement authorities were investigating the transaction.

6. By the time of his criminal trial in early 1986, Respondent had received over $60,000 in royalty income from his $9500 investment, with the wells expected to produce for many years to come.

7. Respondent repaid the $9500 to Fairchild Construction Company only after receiving royalty payments in greater amounts, such that he was never out of pocket. Also, Respondent repaid much of the $9500 in advance of when repayment was due under the terms of the notes, even though at the time he owed greater sums on other debts at higher rates of interest.

8. Judge Nixon was grateful to Wiley Fairchild for providing him with the investment opportunity and told Mr. Fairchild, ". . . if I can ever help you, I will and if I can't, I'll just tell you I can't." It was this offer of help that led Wiley Fairchild to complain to Respondent about being blackmailed in connection with the Drew Fairchild drug case.

9. Wiley Fairchild pled guilty to a crime--the giving of an illegal gratuity to Judge Nixon--as a result of the oil and gas investment.

The favorable investment with Wiley Fairchild led Respondent to become involved in the State drug prosecution of Wiley Fairchild's son. Because of his financial relationship with Wiley Fairchild, Respondent had conversations with Wiley Fairchild, State Prosecutor Paul H. "Bud" Holmes, and attorney Carrol Ingram concerning Drew

Fairchild and the drug case. Yet Judge Nixon failed to disclose these conversations to federal authorities during his April 1984 interview and July 1984 grand jury testimony, leading to his perjury convictions and these impeachment proceedings.

In short, although no Article of Impeachment seeks removal of Judge Nixon from the bench because of the questionable oil and gas investment, evidence concerning the investment is necessary to understand the context of Judge Nixon's dealings with Wiley Fairchild. In addition, the favorable investment sheds light on how Judge Nixon become involved in the Drew Fairchild drug case, and why he lied during his interview and grand jury testimony.[1]

Respondent's contention that evidence concerning the investment will prolong the trial is unjustified. Most of the evidence concerning the investment will be presented through the same witnesses whose testimony will establish that Judge Nixon made false statements during his interview and grand jury testimony. More important, very little trial time need be spent on the investment if Respondent stipulates to the undisputed facts, based in large part on Respondent's own testimony, set forth in the House's proposed stipulations.

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[1] In criminal cases, background evidence that places the acts of the defendant in context is regularly admitted, as is evidence of a defendant's motive or intent. As the Fifth Circuit noted in rejecting Judge Nixon's appeal, even if Respondent had never been charged with the crime of accepting an illegal gratuity, or if the gratuity and perjury charges had been severed at trial, evidence concerning the oil and gas investment would still be admissible in connection with the perjury charges, "[s]ince the proof on all four counts was necessarily intertwined." U.S. v. Nixon, 816 F.2d 1022, 1030-31 (5th Cir. 1987).

II. The Senate Should Admit Prior Testimony

In his motion, Respondent urges the Senate not to admit transcripts of prior testimony unless the witness is unavailable to testify at trial. Respondent relies upon the practice in civil and criminal cases, and claims a "right to see and confront witnesses."

However, Respondent fails to note that both at his criminal trial and in proceedings before the House Subcommittee on Civil and Constitutional Rights, he was afforded and fully exercised the very right to confront witnesses he demands. Respondent was vigorously represented by counsel in both proceedings. Respondent made full use of his opportunity to confront and cross-examine witnesses, and questioned key witnesses at great length in both proceedings. Indeed, at least half, if not more, of the testimony during the criminal trial and before the Subcommittee, which the House urges the Senate to admit into evidence, consists of cross-examination by Respondent's counsel.

The Senate is under no obligation, constitutional or otherwise, to recreate the two-week jury trial that resulted in Respondent's perjury convictions. As the Senate itself recognizes, "the Framers did not intend to obligate the Senate to replicate all features of a judicial trial."[2] If Respondent believes that the demeanor of a particular witness must be viewed in person by the Senate, he can summon the witness to give live testimony. Admission of prior testimony that includes lengthy cross-examination by Respondent is eminently fair and non-prejudicial.

In the impeachment proceedings involving Judge Harry Claiborne, the House moved for the admission of the prior sworn testimony of thirteen witnesses who had testified at Judge Claiborne's second trial. The House also sought to introduce prior admissions of Judge Claiborne made in his trial testimony.[3] These motions were granted by the Senate, and the prior testimony was admitted.[4] Moreover, the Senate Committee in the Claiborne impeachment admitted into evidence a certified copy of the complete transcript of Judge Claiborne's second criminal trial, together with all exhibits, as well as all appellate decisions and orders.[5]

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[2] Memorandum in Support of Defendant's Motion to Dismiss Complaint of Plaintiff Alcee L. Hastings, filed by the Senate in Hastings and Nixon v. The United States Senate, Civil No. 89-1602-GAG, at 49.

The House seeks only to streamline the impeachment trial consistent with fairness to Respondent. With the criminal trial and Subcommittee testimony and exhibits admitted into evidence, the Senate can reserve its valuable trial time for the introduction of key exhibits and testimony in person from critical witnesses. Prior testimony from less essential witnesses, and less critical documents, will be a part of the record before the Senate, will have been subject to prior confrontation and cross-examination by Respondent, and can be referred to by the parties in argument and in the Committee's summary to the full Senate. Without the admission of the criminal trial and Subcommittee records, the parties may be forced to present lengthy live testimony that is less significant to the impeachment charges, thereby prolonging trial and distracting the Senate from the most important evidence.

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[3] Hearings before the Senate Impeachment Trial Committee, United States Senate. 99th Cong. 2nd Session. August 15, 1986, Part 1 of 4 parts, at 297-397.

[4] Id. at 110.

[5] Id. at 111.

For reasons set forth herein and in the House's Motion to Accept Prior Testimony and Exhibits, the House urges the Senate to deny Respondent's Motion in Limine. Evidence concerning the Nixon-Fairchild oil investment is vital to a complete understanding by the Senate of the context of Judge Nixon's interview and grand jury testimony, and Respondent's motive in giving false testimony. Moreover, admission of the criminal trial and Subcommittee testimony and exhibits will help to create a fair and focused trial.

Respectfully submitted,

The United States
House of Representatives

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IN THE SENATE OF THE UNITED STATES
Sitting as a Court of Impeachment

In re)

IMPEACHMENT OF)
WALTER L. NIXON, JR.)

THE HOUSE OF REPRESENTATIVES' RESPONSE TO JUDGE NIXON'S MOTION TO DISMISS IMPEACHMENT ARTICLE III

The House of Representatives, through its Managers and counsel, responds as follows to the Motion to Dismiss Impeachment Article III filed by Respondent, Judge Walter L. Nixon, Jr.

In his motion, Respondent alleges that Article III should be dismissed because

1. Portions of Article III "do not make out an impeachable offense under Article II, Section 4 of the Constitution;"
2. Portions of Article III are "redundant and multiplicitous" of allegations in Articles I and II; and
3. Article III is "complex," "confusing," "unfair" and "completely unworkable."

Respondent's assertions are wholly without merit. Article III is patterned upon "omnibus" articles traditionally used in judicial impeachments, including the recent impeachments of Judges Claiborne and Hastings. Indeed, the very arguments Respondent raises in his motion were unanimously rejected by the Senate by vote of 93-0 on a similar motion to dismiss filed by Judge Hastings.

Article III charges an impeachable offense, is perfectly proper and should be voted upon by the Senate.

I. ARTICLE III PROPERLY CHARGES AN IMPEACHABLE OFFENSE

A. The Content of Article III

Apparently intent on confusing and misleading the Senate, Respondent suggests that Article III "alleges seventy supposedly impeachable offenses." Memorandum in Support of Motion at p. 2. This is simply not the case. Article III alleges but a single offense.

Article III seeks Respondent's removal from office based upon his concealment of information and the consequences of that concealment. Article III charges Respondent with concealing his conversations with Wiley Fairchild, Carroll Ingram and Forrest County District Attorney Paul Holmes concerning the state criminal drug prosecution of Wiley Fairchild's son, Drew Fairchild. So that Respondent will be fully on notice of the charges against him, Article III sets forth in complete detail the alleged concealment. Article III charges Respondent with concealing information through false or misleading statements in an April 1984 interview with law enforcement officials, and in sworn testimony before a federal grand jury in July 1984. The date, location and specific statements alleged to be false are set forth in Article III.

A total of fourteen (14) separate false or misleading statements are set forth in Article III in support of the charge that Respondent concealed information. Seven (7) occurred during Respondent's 1984 interview. The remaining seven (7) took place during Respondent's grand jury testimony. Of the seven grand jury statements alleged to be false or misleading in Article III, four are also at issue in Articles I and II, which track Respondent's perjury convictions.

Respondent' statement to the grand jury that Mr. Holmes never discussed the Drew Fairchild case with him led to Respondent's conviction on one count of perjury. This same statement, found by the jury to be false beyond a reasonable doubt, is alleged in Article I as a basis for impeachment, and is realleged in Article III (2)(A) as part of Respondent's effort to conceal information.

Respondent also told the grand jury that he had nothing whatsoever officially of unofficially to do with the Drew Fairchild case in Federal court or state court, never had a thing to do with the case at all, and "never talked to anyone, state or federal, prosecutor or judge, or in any way influence anybody" with respect to the Drew Fairchild case. These statements were also found by the jury to be false beyond a reasonable doubt, resulting in Respondent's conviction on a second count of perjury. Article II, which tracks the second perjury count, focuses on these statements alone as ground for impeachment. Article III realleges these statements in subsections (D),(F) and (G) as part of Respondent's efforts to conceal information.

Three of Respondent's grand jury statements alleged to be false or misleading in Article III--subsections (2)(B), (C) and (E)--were not the subject of criminal charges against Judge Nixon, but are alleged in Article III to be part of Respondent's effort to conceal information. Moreover, the seven interview statements appearing in Article III were not the subject of criminal charges, but are also alleged to be part of an effort by Respondent to conceal information.

The consequences of Judge Nixon's concealment of information--that he "has raised substantial doubt as to his judicial integrity, undermined confidence in the integrity and impartiality of the judiciary, betrayed the trust of the people of the United States, disobeyed the laws of the

United States and brought disrepute on the Federal courts and the administration of justice"--are alleged in the second paragraph of Article III. This paragraph is modeled on articles of impeachment from prior cases that focus on the impact of a judge's misconduct on the integrity of the judiciary.

In short, Respondent has mischaracterized the content of Article III. This Article is hardly "complex and confusing," but rather very simple and straightforward. Article III charges Respondent with but one offense. In essence, it alleges that Respondent concealed information through false or misleading statements in an interview and in sworn testimony, impugning the integrity of the judiciary and warranting Respondent's removal from office.

B. The Acts of Respondent Alleged in Article III Clearly Constitute "High Crimes and Misdemeanors"

Respondent's argues that Article III should be dismissed because it fails to state an impeachable offense. Yet Respondent defeats his own argument. In his Memorandum in Support of his Motion, Respondent repeatedly concedes that criminal conduct constitutes an impeachable offense. Respondent thus must agree that the alleged concealment of information by committing perjury before a federal grand jury, a federal crime, must state an impeachable offense. Similarly, the giving of material false statements to federal investigators to conceal information during an interview is both a felony under the criminal law[1] and conduct warranting impeachment.

Respondent does not claim that the concealment of information alleged in Article III cannot, as a matter of law, warrant impeachment. Rather, it appears that Respondent's complaint is only with the second paragraph of Article III and only part of that paragraph, which he claims contains "subjective" allegations of misconduct.[2]

But the House has not charged Judge Nixon with being a generally "bad person," which is Respondent's warped translation of Article III. Memorandum in Support of Motion to Dismiss at 15. Nor is Article III "subjective" in any sense of the word. Respondent isolates certain phrases in the second paragraph of Article III--"raised substantial doubts as to his judicial integrity, undermined confidence in the integrity of the judiciary, betrayed the trust of the people of the United States . . . " [etc.]--and then argues as if the remainder of Article III did not exist.

---

[1] U.S.C. Section 1001 provides as follows: "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more that $10,000 or imprisoned not more than five years, or both." Respondent was never charged with this crime, although the facts amply justify prosecution for this offense.

[2] Respondent agrees that the phrase "disobeyed the laws of the United States" states an impeachable offense. Memorandum in Support of Motion to Dismiss at p. 3, fn. 2.

Respondent ignores the key words "by the following," which link the phrases Respondent claims are "subjective" with specific allegations of concealment through false or misleading statements. Given these specifics, Respondent's complaint that Article III is "subjective" and "standardless" is absurd.

Respondent also expresses concern that federal judges not be impeached for "issuing unpopular decisions," "smoking marijuana," "extramarital affairs" or "attending a meeting of the communist party." Memorandum at 16. But a careful review of Article III reveals that Respondent is not charged with such conduct. Concealing information by giving false or misleading statements to a grand jury in sworn testimony and to law enforcement officials in an interview is conduct warranting both criminal sanctions and removal from office. Respondent's suggestion that Article III is "a gross expansion of impeachable offenses beyond the intent of the Framers," Memorandum at 19, is simply nonsensical, particularly given Respondent's own recognition that criminal offenses may warrant impeachment. The Framers would applaud both Judge Nixon's criminal prosecution and his removal from office.

C. Article III is an "Omnibus" Article Traditionally Charged and Voted Upon by the Senate in Impeachments

As Respondent recognizes, the phrases in Article III paragraph 2 that he isolates from the whole and then attacks so vigorously are modeled upon "omnibus" or "catch-all" articles of impeachment presented by the House and voted upon by the Senate in every impeachment trial this century that resulted in conviction. With no support, Respondent urges the Senate to defy the long-standing practice of an "omnibus" article that sets out a judge's collective misconduct and describes the effect of his misbehavior on the integrity of the judge and the judicial system as a whole.

Past "omnibus" impeachment articles contain phraseology virtually identical to that alleged in Article III and criticized by Respondent. For example, Judge Halsted Ritter (1936) was charged in a final article of impeachment with misconduct, previously alleged in earlier articles, that had the cumulative effect of "bring[ing] his court into scandal and disrepute, to the prejudice of said court and public confidence in the administration of justice therein, and to the prejudice of public respect for and confidence in the Federal judiciary . . . ."[3] The Senate found Judge Ritter guilty of the omnibus charge.

Similarly, in the 1986 impeachment of Judge Harry Claiborne, the Senate voted upon and convicted Judge Claiborne of an omnibus article (Claiborne Article IV) containing some of the very same language that Respondent here attacks:

> "Judge Harry E. Claiborne, by virtue of his office, is required to uphold the integrity of the judiciary and to perform the duties of his office impartially.
>
> "Judge Harry E. Claiborne . . . has betrayed the trust of the people of the United States and reduced confidence in the integrity and impartiality of the judiciary, thereby bringing disrepute on the Federal courts and the administration of justice."[4]

In the pending impeachment of Judge Alcee L. Hastings, the final article (Article XVII) is an omnibus article alleging that Judge Hastings, through his collective, specified misconduct, did

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[3] Congressional Record, Senate Proceedings, 74th Cong., 2d Sess., March 31, 1936 at 4655 (hereinafter "Ritter Proceedings").

[4] Report of the Senate Impeachment Trial Committee, Hearings before the Senate Impeachment Trial Committee, United States Senate, 99th Cong., 2nd Session, Part 1 of 4 parts, at 9.

> ". . . undermine confidence in the integrity and impartiality of the judiciary and betray the trust of the people of the United States, thereby bringing disrepute on the Federal courts and the administration of justice by the Federal courts."

In the Hastings impeachment, on March 16, 1989, by a vote of 93-0, the Senate resoundingly denied a motion to dismiss the omnibus article in which Judge Hastings raised the very same arguments presented by Respondent here. Judge Hastings, like Judge Nixon, claimed that the omnibus article failed to allege an impeachable offense. The full Senate unanimously rejected this argument.[5]

There is a good reason for the Senate to consider an omnibus article that collects a judge's misbehavior and recites its impact on judicial integrity. As argued by the House Managers in the Ritter proceeding, the omnibus article alleges

> ". . . a substantial doubt as to judicial integrity. . . . We contend that this is the highest crime which a judge can commit on the bench. It is not whether he did

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[5] *See* Impeachment of Judge Alcee L. Hastings, Motions to Dismiss, 101st Cong., 1st Sess., Doc. No. 101-4, printed February 2, 1989 at 98-105 and 220-21, containing Judge Hastings' written motions and supporting memoranda. Oral argument on the motion appears in 135 *Congressional Record* No. 29, March 15, 1989, at S2549-S2564.

> this thing, that thing, or the other thing, but whether or not the sum total of the things he has done has made the people doubt his integrity as a judicial officer."[6]

The special duty and standard of conduct required of Federal judges is at the heart of Nixon Article III, just as it has been with prior omnibus articles. The purpose of such an article was perhaps best described by House Manager Peter Rodino in the Claiborne case:

> "Conviction on [Claiborne] Article IV, however, rests on a separate and compelling legal theory, which has roots deeply embedded in the impeachment power. In 1936, the Senate convicted Judge Halsted L. Ritter of bring disrepute upon the Federal judiciary that he had been chosen to represent.
>
> As Members of this body have recognized in prior judicial impeachments, the judges of our Federal courts occupy a unique position of trust and responsibility in our system of government: They are the only members of any branch who hold their office for life; they are purposely insulated from the immediate pressures and shifting currents of the body politic. But with this special prerogative of judicial independence comes the most exacting standard of public and private conduct."[7]

In short, Respondent's complaints concerning those portions of Article III focusing on judicial integrity are completely unfounded.

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[6] Ritter Proceedings, supra, at 4658.

[7] Proceedings of the United States Senate, 99th Cong., 2d Sess., S. Doc. 99-48, at 122.

II. ARTICLE III IS NOT "REDUNDANT" OR "MULTIPLICITOUS"

As described above, of the 14 statements by Judge Nixon alleged to be false or misleading in Article III, four were specifically found by the jury to be false, resulting in Respondent's criminal convictions. These four statements are the basis of Articles I and II and are realleged in Article III. Respondent complains that these allegations in Article III are "redundant" and "multiplicitous."[8] But Respondent is mistaken. In prior impeachments the Senate has regularly considered omnibus articles such as Article III that reallege conduct also at issue in other articles.

Interestingly, Respondent argues that "once a judgment has been rendered in any proceeding, the parties involved cannot relitigate the same issue." Memorandum at 20. Apparently Respondent believes that since the statements set forth in Articles I and II have been found to be false beyond a reasonable doubt by a jury, Judge Nixon cannot relitigate this issue. The sole question for the Senate would then be one of remedy--given that Judge

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[8] The statements set forth in Article III subsections 2(A), (D), (F) and (G) form the basis for Articles I and II. However, Respondent also moves to dismiss subsection 2(E) of Article III, a statement that was not specifically found by the jury to be false. Since Subsection 2(E) is not set forth in Articles I and II, Respondent's motion as to this subsection makes no sense whatsoever.

Nixon's statements were false, does this conduct warrant impeachment?

Although Respondent correctly notes that res judicata applies here, he errs in concluding that the House may not re-allege conduct in an omnibus article such as Article III. Indeed, the full Senate considered and soundly rejected this exact point on March 16 of this year, when it denied by vote of 93 to 0 the Motion to Dismiss Article XVII (the omnibus article) filed by Judge Alcee L. Hastings.[9]

Respondent raises the very same worn argument rejected by the Senate in Hastings and earlier impeachments. The final articles of impeachment in the Archbald, Ritter, Claiborne, Hastings impeachments all realleged acts of misconduct separately alleged in other articles, and the Senate voted to convict on the omnibus article in Archbald, Ritter and Claiborne. There is simply no reason to reverse this well-established practice. Indeed, as noted by the House Managers during the Ritter proceedings, it is quite proper for the House to place before the Senate, in a single article, "the sum total of the things [a judge] has done . . . ." so that the Senate may view the misconduct in its entirety.[10] The Senate Chair during the Ritter proceedings recognized that even though the omnibus article contains allegations set forth in other articles, the omnibus article is worthy of the Senate's independent consideration. The Chair stated, "[a] point of order is made as to the Article VII in which Respondent is charged with general misbehavior. It is a separate charge from any other charge.[11] Significantly, in the Ritter impeachment, the Senate voted to convict only upon the final article.

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[9] See note 5, supra.

[10] See note 6, supra.

In sum, Respondent's complaints of "multiplicity" and "redundancy" are unfounded. Article III is a separate and distinct charge that focuses on the integrity of the judiciary, and alleges that Respondent's cumulative misconduct and the devastating consequences of his conduct on the judiciary warrant his removal from office. Even if Respondent is found "not guilty" on Articles I and II, the Senate may quite properly examine the four statements of Respondent at issue in those Articles and realleged in Article III, as well as the ten other statements set forth in Article III, in determining whether Judge Nixon's misconduct in toto, and its effect on judicial integrity, warrants a vote of "guilty" as to Article III.

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[11] Ritter Proceedings, supra, at 637-38.

III. ARTICLE III IS NEITHER COMPLEX NOR CONFUSING

In his final argument, Respondent suggests that Article III is unduly "confusing." This contention is simply untrue. Article III is straightforward, places Respondent squarely on notice of the specific statements alleged to be false or misleading, and is by no means "confusing."

Respondent suggests that Article III is unfairly "duplicitous." He relies upon criminal cases in support of this argument. Yet his criminal analogy is not an apt one. Impeachment is not a criminal proceeding. Double jeopardy, the basis for criminal case law dealing with duplicitous indictments, is not a problem here, since unlike the criminal law in impeachment there is but a single sanction (removal from office) that can occur but once regardless of the number of articles.

Finally, Respondent claims that Article III "effectively destroys Judge Nixon's right to be removed only by a two-thirds vote." Memorandum at 23. This identical argument was raised by Judge Hastings in his Motion to Dismiss Article XVII and unanimously rejected by the Senate on March 16. The Ritter proceedings also make clear the Senate may properly find a judge guilty of cumulative misconduct set forth in an omnibus article, even if the

Senate acquits the judge on each allegation individually. Judge Nixon's own mathematics establish the point. See his Memorandum at 23. When confronted with the cumulative evidence of Respondent's misconduct, if 70 Senators believe Judge Nixon should be removed from the bench, the necessary two-thirds of the Senate will have agreed that Respondent is no longer fit to hold the esteemed position of Federal judge, even if the 70 disagree as to which of the fourteen statements by Respondent at issue in Article III are false. Judge Nixon may argue that this a "clearly unacceptable outcome," Memorandum at 23, but the Constitution dictates otherwise.

CONCLUSION

Judge Nixon's Motion to Dismiss Article III should be denied. Article III is a separate charge and a proper omnibus article consistent with prior impeachment cases. Judge Nixon's arguments are the same as those recently raised by Judge Hastings and unanimously rejected by the Senate. Article III in its entirety and present form, should be presented to the Senate for vote along with Articles I and II.

Respectfully submitted,

The United States
House of Representatives

By Alan I. Baron (PEK)
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Managers of the House of Representatives

Jack Brooks
Don Edwards
Benjamin L. Cardin

F. James Sensenbrenner
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House Judiciary Committee Staff
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William Jones, General Counsel
Daniel Freeman, Counsel
Catherine A. LeRoy, Counsel
Colleen Kiko, Counsel

IN THE SENATE OF THE UNITED STATES
Sitting As A Court Of Impeachment

In re)
IMPEACHMENT OF)
WALTER L. NIXON, JR.)

JUDGE NIXON'S RESPONSE TO THE HOUSE MANAGERS' PROPOSED STIPULATIONS

In two separate documents, the House Managers have proposed 171 supposed factual stipulations, and five stipulations regarding procedures for the Senate trial. We are skeptical of the value of the stipulation process. We doubt that it will save any appreciable time in the trial itself and we regret that the stipulation process itself invariably invites posturing and semantical gamesmanship. This is not a terribly complex case that needs to be tried on paper by lawyers; this is a case that turns on the credibility and plausibility of specific witnesses and of supposed events and sequences of events. It should be tried through the witnesses.

Nevertheless, we are generally willing to stipulate to those facts that, in our view, are established in public documents or some objective source of information. We are not willing to stipulate to any disputed facts or irrelevant matters, and the House Managers have proposed stipulations on many such disputed facts and irrelevant matters.— Equally, we many such disputed facts and irrelevant matters. Equally, we are not willing to stipulate to matters that are not squarely disputed when we object to the posturing and argumentation that are explicit or implicit in the proposed stipulation. We also are not willing to agree to proposed stipulations that concern matters that will necessarily be the subject of live testimony, which renders the stipulation process merely duplicative. For example, it is pointless to discuss stipulations as to Judge Nixon's testimony concerning the facts of the case; he is entitled to give his testimony directly to the Senate, not as refracted through the hostile pen of his prosecutors.

Accordingly, our response to the proposed factual stipulations falls into three categories: (1) matters as to which we are willing to agree to the proposed stipulation; (2) matters on which we decline to respond because the proposed stipulations are plainly irrelevant to the Articles of Impeachment; and (3) matters on which we decline to respond because the proposed stipulations are inaccurate or biased, or concern matters that will have to be the subject of testimony regardless of the stipulation process.

1. Stipulations of Fact Agreed To -- We agree to fifty-two proposed stipulations of fact:
   1, 2, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 30, 31, 32, 97, 101, 103, 106, 108, 111, 112, 113, 114, 115, 116, 122, 123,

124, 137, 138, 139, 141, 142, 143, 144, 151, 152, 153, 162, 164, 167, 168, 171.

2. Irrelevant Factual Stipulations -- We decline to respond to proposed factual stipulations 35 through 96 and 26 through 28 because they concern matters that have not been placed in issue by the Articles of Impeachment and are not relevant to the impeachment trial. It is striking that over one-third of the proposed factual stipulations -- 65 out of 171 -- relate to such irrelevant matters.

3. Remaining Stipulations of Fact -- We decline to agree to the remaining fifty-four proposed stipulations which concern disputed matters, or are biased, or incomplete, or inaccurate, or relate to matters that necessarily must be covered by live testimony and therefore are not properly the subject of stipulations.

The House Managers also propose five stipulations concerning "prior testimony and authenticity of exhibits." For the reasons set forth at greater length in Judge Nixon's Opposition To The House Managers' Motion To Accept Prior Testimony And Exhibits, and the Memorandum In Support of Judge Nixon's Motion In Limine. We do not agree to the first two proposed procedural stipulations concerning the transcripts of testimony and exhibits before the House Subcommittee and at Judge Nixon's trial. We note with disappointment that the House Managers do not include in their proposed stipulation the testimony and exhibits that were produced at the hearing last August on Judge Nixon's Motion for a New Trial. If the House Managers were really concerned with presenting a full presentation of the facts -- rather than a one-sided version slanted to favor their position -- they certainly would include that material in their proposed stipulation.

We decline to join the third proposed procedural stipulation, which incorporates the House Managers' proposal that live testimony of witnesses will be the exception rather than the rule. The Senate must convene a trial on the Articles of Impeachment. The House Managers are urging the Senate to abandon its obligation to conduct a trial in this case, asking instead that the Senate referee several rounds of competitive paper-shuffling by lawyers.

Similarly, we do not agree with the fourth proposed procedural stipulation, concerning the authenticity and genuineness of exhibits before the House Subcommittee. The Senate has no reason to care whether the exhibits before the House Subcommittee were authentic and genuine. On July 31, the parties will designate the exhibits for the Senate trial. We anticipate that there will be little controversy over the authenticity and genuineness of the vast majority of those exhibits, and we pledge to attempt promptly to agree on the authenticity and genuineness of those Senate exhibits.

stipulating to the authenticity of the House Subcommittee materials would be a pointless historical exercise.

Finally, the House Managers propose that we stipulate to the accuracy of a transcript of the interview with Judge Nixon on April 19, 1984. Since the date of the House Managers' proposed stipulations, we have provided to the House Managers our further corrections to that transcript. Consequently, we anticipate that agreement can be reached on the final transcript as soon as the House Managers have an opportunity to review our most recent corrections.

Respectfully submitted,

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Date: July 10, 1989

IN THE SENATE OF THE UNITED STATES
Sitting as a Court of Impeachment

In re)
)
IMPEACHMENT OF)
WALTER L. NIXON, JR.)

THE HOUSE OF REPRESENTATIVES' RESPONSE TO JUDGE NIXON'S OPPOSITION TO THE HOUSE'S MOTION TO ACCEPT PRIOR TESTIMONY AND EXHIBITS

The House of Representatives, through its Managers and counsel, responds as follows to Judge Nixon's opposition to the House's Motion to Accept Prior Testimony and Exhibits.

The House has urged the Senate to begin its proceedings by simply admitting into evidence, as the first exhibit, the record from Respondent's criminal trial, for use by the Senate as it sees fit.[1] Indeed, in the Claiborne impeachment, the only other impeachment involving a convicted felon, the Senate on its own accord introduced into evidence a certified copy of the complete transcript of Claiborne's second criminal trial, together with all exhibits and appellate decisions.[2]

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[1] The House has also asked the Senate to accept the House Subcommittee record as the second exhibit.

The decision in Claiborne to admit the criminal trial record makes perfect sense and should be followed here. With the criminal trial record before it, the Senate can reserve valuable trial time for the most critical testimony and exhibits, even while assuring that less essential testimony will be available for review by any Senator who chooses to do so. This procedure is eminently fair to Respondent, because he vigorously cross-examined all witnesses at trial.

Contrary to Respondent's suggestion, the House's position in this proceeding is not inconsistent with that taken by the House in the Hastings impeachment. Judge Hastings has sought to introduce his criminal trial transcript but, unlike the House in this proceeding, not for whatever use the Senate sees fit. Rather, Judge Hastings wishes to introduce the transcript only for the narrow and limited purpose of proving that the accusations made in Hastings Impeachment Articles I through XV were "fully presented at the criminal trial and were committed to the jury that acquitted respondent."[3] Had Judge Hastings simply moved to introduce the entire transcript for any and all appropriate purposes, as the House seeks here, the House would not have objected.

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[2] Hearings before the Senate Impeachment Trial Committee, United States Senate. 99th Cong. 2nd Session, August 15, 1986, Part 1 of 4 parts at 111.

Respondent disingenously quotes but a portion of the House Managers' position in the Hastings impeachment. Respondent not-so-cleverly avoids quoting the basis for the House's objection to Hastings' proposed limited use of the transcript, see Memorandum at p. 2, line 3 of the quoted passage,[4] and then unfairly criticizes the House for purported inconsistency. In fact, the House's position in the two impeachments is not at all inconsistent.

Respondent would have the Senate duplicate all trial and post-trial evidentiary proceedings to date, involving a total of at least three weeks of testimony, even though

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[3] Statement on Behalf of Respondent (Hastings) Concerning Use of Prior Testimony, June 14, 1989 at 1.

[4] The portion of the House's position redacted by Respondent reads as follows:

> "However, the House objects to the admission of the entire transcript of the trial proceedings in United States v. Hastings, 'not . . . offered to prove the truth of the matter [by Judge Hastings] . . . [but] to prove that accusations made in Articles I through XV were fully presented at that trial and were committed to the jury that acquitted respondent,'" quoting Judge Hastings' Statement concerning the use of prior testimony, June 14, 1989 at 1.

Respondent has confronted and cross-examined every witness at least once, and some witnesses twice or even three times. With the trial record admitted into evidence, Respondent could still subpoena every witness whose credibility he challenges, so that the Senate could view those witnesses' demeanor.

Neither the Constitution nor simple fairness prevents the Senate from reviewing the criminal trial record as part of its consideration of Respondent's fitness to hold office. The House urges the Senate to admit the criminal record as its first exhibit.

Respectfully submitted,

The United States
House of Representatives

By Alan I. Baron
Alan I. Baron
Special Counsel

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Catherine A. LeRoy, Counsel
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IMPEACHMENT OF JUDGE WALTER L. NIXON, JR.

THURSDAY, JULY 13, 1989

U.S. SENATE,
IMPEACHMENT TRIAL COMMITTEE,
Washington, DC.

The committee met, pursuant to notice, at 3:30 p.m., in room SD-628, Dirksen Senate Office Building, Hon. Wyche Fowler, Jr. (chairman of the committee) presiding.

Present: Senators Fowler, Heflin, Wirth, Reid, Robb, Kohl, Hatch, Danforth, Chafee, Murkowski, Jeffords, and Mack.

House managers present: Representatives Don Edwards, Benjamin L. Cardin, F. James Sensenbrenner, Jr., and William E. Dannemeyer.

Counsel present: Alan I. Baron, special counsel, House Impeachment Committee; Peter E. Keith, assistant special counsel, House Impeachment Committee; Morgan Frankel, counsel, Senate Impeachment Trial Committee; Donald A. Purdy, Jr., counsel, Senate Impeachment Trial Committee; David O. Steward, counsel for Respondent.

Staff present: Anthony L. Harvey, administrator, Senate Impeachment Trial Committee; Barbara Thoreson, staff assistant, Senate Impeachment Trial Committee; Sara Fox Jones, staff assistant, Senate Impeachment Trial Committee.

The **CHAIRMAN**. Ladies and gentlemen, this is the hearing in the matter of Judge Walter L. Nixon, Jr.

By agreement of counsel, we are here today to hear the arguments on the pretrial issues. By agreement of counsel, we will hear from the Respondent for up to 40 minutes on all motions on behalf of Judge Nixon. Then we will hear from the House managers in response on all their motions and any rebuttal they might offer, and then 10 minutes on each for further rebuttal.

I think, upon agreement of all the parties and the counsel for the parties, we will hear the arguments today and then the panel will make their decision tomorrow and so advise.

Mr. Stewart, would you like to begin?

Mr. **STEWART**. Thank you, Mr. Chairman.

Mr. Chairman and members of the committee, just to provide a quick road map of where I hope to go this afternoon, the agenda that has been distributed by staff is not that helpful, unfortunately. I did not participate in its drafting.

I hope to begin with discussing the motion to dismiss Impeachment Article III, which is the second item on the agenda; then to address the issue of a trial before the full Senate and also to address our motion in limine.

The remaining issues, I would hope to get to, but I may well not get to them so I would expect to submit them on our papers, or I will try to cover them in rebuttal if I get an opportunity.

The **CHAIRMAN**. Mr. Stewart, let me interrupt you just to say what I know you know, but to remind us all. We have a constitutionally required panel, as you know, but we're not all lawyers. So to the extent that you can break out of legal terminology and put it in the King's English, it would be of tremendous help to you and all involved.

Mr. **STEWART**. I'll do the best I can. Sometimes the training overcomes my best instincts.

The **CHAIRMAN**. I understand that.

Mr. **STEWART**. Talking about Impeachment Article III to start with, we are very troubled by Impeachment Article III. Quite frankly, it is in our judgment the lazy man's Impeachment Article. I want to first talk about what it's not.

It is not a single offense. It is a rather a collection of 14 alleged false statements in two separate events—an interview in April 1984, and then grand jury testimony in July 1984. For each of those alleged false statements, supposedly there were five different types of misconduct. If you do the arithmetic, it comes out to 70 different impeachable offenses alleged there.

In addition, Impeachment Article III is not clear. I think you have to read it several times to be exactly sure what is being alleged, and quite frankly, it attributes to Judge Nixon certain alleged false statements that I'm not sure I have yet identified in the transcripts. I hope that we will be able to clarify that as time goes on.

These flaws in Impeachment Article III boil down to three basic problems. First, it seeks to remove Judge Nixon from office based on subjective allegations of perceptions of what his conduct was rather than what his conduct actually was. Those allegations are not "high crimes or misdemeanors" as required by the Constitution.

Second, it repeats verbatim the allegations in Articles I and II. There is no reason to have such redundant allegations in the third Article.

Finally, as I said, it does have variety of allegations in it and such a wide variety that it becomes unmanageable to sort out the allegations, and frankly, we believe it is designed to be virtually acquittal-proof, that it is stacked, that they have packed enough allegations in there that they can pick up a vote here and a vote there and a vote here, and we cannot prevail on it. We think that that is unfair and not consistent with the intent of the framers.

I think that sort of tactic demeans this process, demeans the Senate and the House and the Judiciary. The trial should be an inquiry into what Judge Nixon has done, what specific impeachable offenses he may have committed. It should not be an attempt to stack the charges so that a coherent defense, or even a coherent vote, is impossible.

I want to emphasize we are not objecting to Impeachment Articles I and II. I am sure I will tell you things that I don't like about them over the course of these proceedings, but we don't say that they are unfair; we don't say that they fail to state an impeachable offense. They are adequate as a matter of law; they do state impeachable offenses, and we are prepared to defend against them. We don't think the same thing can be said about Article III.

Let me begin with the question of whether an impeachable offense has been alleged.

They key passage is the charging paragraph for us on this point, which is the second paragraph. It defines the impeachable offenses that Judge Nixon supposedly has committed, which are then applied to the 14 specific alleged false statements.

The charging paragraph lists five different types of supposed misconduct. The first that I want to talk about and just quickly is that he has disobeyed the laws of the United States. I do not argue with that, and we do not contend that that would not be an impeachable offense. We agree that that would be. So I am not, on this point, attacking that.

The other four, though, are very troubling. It states that Judge Nixon has raised substantial doubt as to his judicial integrity, that he has undermined confidence in the integrity and impartiality of the judiciary, that he has betrayed the trust of the people of the United States, that he has brought disrepute on the Federal courts and the administration of justice.

These are subjective allegations. They are not impeachable offenses. They are rhetorical flourishes. They concern what other people might conclude the effect of what Judge Nixon did. They do not involve what he did.

What is an impeachable offense, then? That is the question I want to explain to you, what we think is an impeachable offense.

The Constitution says treason, bribery, or high crimes and misdemeanors. Clearly in this case, we are not dealing with treason or bribery, so we have to figure out what "high crimes and misdemeanors" means. That was a term of art drawn from the English parliamentary law.

Scholars who have studied the English history have concluded that it meant only abuse of office—bribery or corruption, exceeding official powers, or failing to exercise official powers.

We have not taken such a narrow view of it. We agree that it can also include serious legal offenses, illegal actions. If you look at what happened in the Constitutional Convention, you can figure out what they were getting at through this somewhat archaic term.

First, the convention refused to approve the English system of address. There was a system in England to remove judges by address. Both Houses of Parliament, by majority vote, would say please remove that judge, and the Executive, the King, would remove him. No charges, no allegations, no trial—just let's get rid of him.

Several State constitutions at the time of the Constitutional Convention had removal by address. It was proposed in the Constitutional Convention to have a similar system. I believe it was John Dickinson of Delaware who proposed it. Governor Morris, who was the man who actually drafted the Constitution, the final version of it, explained the problem with removal by address, stating that it was fundamentally wrong to subject judges to so arbitrary an authority, and the Convention voted it down. So they did not want to have that sort of arbitrary removal of judges.

The next episode is the most important. Treason and bribery were agreed to as impeachable offenses. The issue then was should any other offenses by listed. George Mason of Virginia proposed to add "maladministration". That is a term that again doesn't have much current meaning. It had a technical meaning to lawyers in 1787. But James Madison, the Father of the Constitution, strongly opposed this point and said no, that's too vague a term; it would be equivalent to service or tenure at the pleasure of the Senate.

The framers adopted Madison's view and rejected "maladministration", and chose the narrower term, "high crimes and misdemeanors."

Clearly, the framers intended to have limited grounds for impeachment, and the policy, the reason they wanted this, was to preserve the independence of the courts. That is a constant theme in the Constitutional debates.

We think that clearly, then, the historical meaning of abuses of office are properly impeachable offenses. We also agree that serious crimes are. But we think the independence of the Judiciary and faithfulness to the constitutional document and the intent of the framers requires that those be the only impeachable offenses.

With that background, let's take a look again at the allegations in Impeachment Article III. First, the allegation the Judge Nixon has raised substantial doubt as to his judicial integrity.

What does that mean? Would a person substantially doubt the judicial integrity of a judge who had smoked marijuana as an adult? How about a judge who has been seen in the company of businessmen whose dealings are considered sharp? How about a judge who has had a very public extramarital affair, or a judge who has had a very public extramarital affair, or a judge who has failed to recuse himself due to an oversight from a case in which recusal would have been the proper course? That happens.

Our concern here is that this language is subject to abuse, to distortion. The issue is the standard of conduct to be applied to judges. Can they be impeached based on such a subjective standard?

The House managers protest that what they really charge is that Judge Nixon intentionally withheld information. We agree that if he did so, and it was illegal to do so, then that is an impeachable offense. But his conduct is not impeachable simply because it might look bad to someone. That's not what the framers intended.

When you go through the other allegations here, you have the same problem—that he has undermined the confidence in the integrity and impartiality of the Judiciary. That's a fine phrase, but what does it mean? Many citizens feel that way about the Supreme Court's ruling in the flag-burning case—that it has undermined confidence in the integrity and impartiality of the Federal Judiciary. Many citizens feel that way when the Supreme Court effectively reverses itself on a fundamental right like abortion. Many people feel that way—or at least some people feel that way, I should say—when Colonel North is convicted of three felonies and receives no jail time. Judge Nixon is convicted of two felonies and gets 5 years.

What about the next one—he has brought disrepute on the Federal courts and administration of justice. Again, it is an entirely subjective conclusion. How do you find out if he has brought disrepute on the Federal Judiciary? Do you take a poll? Do you canvass your constituents? Do you consult your visceral feelings? These cannot be impeachable offenses. They do not focus on Judge Nixon's conduct. Could the same Constitutional Convention that rejected "maladministration" as too vague have possibly adopted the impeachable offense of raising substantial doubt as to his integrity?

Compare that to our standard. Based on the Constitution and the intent of the framers, has accused committed a serious crime, or has he abused his public powers? The question, then, is what has the accused done? It is an objective question that could be answered based on facts.

The question is not has he raised substantial doubt as to his integrity.

For the first 150 years of impeachments, the Congress never resorted to this kind of broad, subjective allegation. It has bubbled up in the last several impeachments. We would urge the Senate to put a stop to it. This is not a proper way to impeach someone or to remove him from office.

A second point is duplicative charges. The allegations in Articles I and II are repeated in Article III, subsection (2). Those are that when Judge Nixon appeared before the grand jury, he first falsely denied that Bud Holmes, who was the district attorney in Hattiesburg, has discussed the *Drew Fairchild* case with him. The second duplicative allegation is that Judge Nixon falsely denied that he had talked to any public official to influence the handling of the *Drew Fairchild* case.

Now, the House managers do not deny that Article III includes accusations that duplicate Articles I and II. They acknowledge that. What good reason is there to duplicate them? If the Senate votes to acquit Judge Nixon on counts 1 and 2, what justification is there to put him to trial again on count 3, on the same counts on which he has just been acquitted? In a criminal case or in a civil case, the jury doesn't vote twice on the same allegations. Why should we have that procedure in the gravest constitutional proceeding?

Would anyone in this room want to be tried like that—to answer the same allegation twice in the same proceeding? We submit that this is a tactic, this is a tactic. This is not worthy of the impeachment process.

This leads to the third, closely related issue we raise about Article III, which is its sheer unmanageability. Candidly, this issue was raised in the Hastings case. We don't think it was raised very fully—he focused on other issues—but it was presented. I am presenting it again, though, because I feel so strongly about it.

We have been through the five supposed types of misconduct—undermining confidence in the Judiciary, raising substantial doubt as to his integrity, and on. When you have five allegations of misconduct applied to 14 different supposed false statements, what does your vote mean? What does a vote to convict on Article III mean? There are 70 different offenses charge. A vote to convict could mean that the Senator voting found that special event No. 4

undermined the public confidence in the integrity of the Federal Judiciary, but acquittal was proper on all of the other charges. Or, it could mean that the Senator found specific events Nos. 6 and 8 raised substantial doubts as to Judge Nixon's integrity, but the other allegations were groundless.

Or, the Senator's vote could mean that specific events Nos. 1, 3 and 11 brought disrepute on the Federal courts, but the other allegations were groundless.

With simply 14 different accusations—not even getting up to 70—the managers only have to make one stick to get each Senator's vote.

I have done the arithmetic for the different combinations you could get, and it gets up into thousands of different combinations of votes they could get. And I ask again, what are we doing. Are we being faithful to the Constitution, to the intent of the framers, that the impeachment procedure only be used to remove judges for high crimes and misdemeanors, or are we letting the impeachment process be diverted by a cleverly-written impeachment article which is designed to be virtually unanswerable?

Compare Impeacement Article I. Whatever else I may say about it, Article I is clear—did Judge Nixon falsely deny that Bud Holmes has discussed the *Drew Fairchild* case with him? There are two possible answers to that question—yes or no. Your vote on that question, on that Impeachment Article, will be clear.

For Impeachment Article III, there are hundreds of possible interpretations your vote may be subject to, and what I feel most intensely personally is only one of them is acquittal. All the rest are conviction on one of those counts. That is not fair to put us to all of that jeopardy. If they think all those things were illegal, try them all; let's have a vote on all of them. Don't lump them all together and pick up a vote here an vote there and a vote there.

Which would anyone in this room want to be tried on—Impeachment Article I, where there are two answers, one yes, one no; or Impeachment Article III, where there are hundreds of answers, and only one of them is acquittal? Which of those articles do you think James Madison of Virginia, or Governor Morris of Pennsylvania, or Rufus King of Massachusetts would recognize as what they intended when they voted for the Constitution?

And I think the House managers' brief as I read it this morning really made this point for us. They defended this clause, arguing that it has been used in every impeachment trial in this century in which there has been a conviction. It is a tactic, gentlemen, it is a tactic. It is not a fair way to proceed in an impeachment under the Constitution.

I want to briefly talk about our argument for trial before the full Senate. There are two basic reasons we have for requesting trial before the full Senate. We certainly mean no disrespect to this committee. Frankly, our complaint is with the other 88 people, not with you people.

As a practical matter, we don't think that this case can be tried effectively when 88 jurors will not hear the evidence or see the witnesses. Again, let me speak plainly. I need 34 votes to win. That is less than a majority of the 88 Senators who will not hear the evidence. But the committee trial mechanism prevents us from presenting our evidence to those 88 people. Those Senator's votes will not be based on hearing the witnesses. They will be based on a variety of factors—I probably don't know all of them. Surely, a critical issue will be what you gentlemen say about the case-press reports, corridor conversations, staff review od documentary materials—but it will not represent the mature reflection and mature judgment by persons of public experience that the impeachment process requires.

I don't want to dwell on this practical point, but I do want to quote—read quickly from an article by Senator Heflin from the *Claiborne* case when he was reflecting on it.

He wrote:

> The other 88 members of the Senate did not have the advantage of hearing the testimony and arguments by counsel. The transcript of the hearing on Judge Claiborne's impeachment totalled over 3,500 pages. Therefore, it is highly improbable that any Senate had the time to thoroughly review this material. Few Senators other than the 12 members of the Impeachment Committee were familiar with all the elements of the case.

That is not the way an impeachment should be conducted.

The question, then, is why should you care, why should it matter. The answer is simple: The Constitution says that the Senate shall try the case.

I want to quickly run through the historical evidence. Why did the framers choose this body, the Senate, to hear impeachments? The debates of the Constitutional Convention make it clear that Madison and Hamilton, two of the leaders of the Convention, wanted to have the trail in the Supreme Court. The framers rejected that choice, and they rejected it because they wanted a more numerous court. They were men of the world. They were concerned that the Justices of the Supreme Court would be too few, and that if a couple of Justices were corrupted or were biased, you would not get a true vote.

They chose the Senate precisely because it is numerous. By placing the trial of impeachments on a committee of 12, the Senate is flouting that intent.

Senator REID. Upon what do you base that statement?

Mr. STEWART. Pardon me?

Senator REID. What do you base that statement on?

Mr. STEWART. Which statement?

Senator REID. That you just said, that they wanted numerous people. Do you have anything to support that?

Mr. STEWART. Yes, sir, the Federalist Papers; Hamilton explained it on that ground. In addition——

Senator REID. Where in the Federalist Papers?

Mr. STEWART. It is cited in my brief. I think it is Federalist No. 65. I can't give you a page from memory, I'm sorry, Senator.

Senator REID. OK.

Mr. STEWART. It is a long quotation in our brief.

Second, the framers based the impeachment process on the English practice with impeachments. For 160 years before the Constitutional Convention, parliamentary impeachments were conducted before the full House of Lords.

Third, just look at the language they used. "The Senate shall have the sole power to try all impeachments"—not to vote on all impeachments, not to read a transcript of the impeachment trial, not to have a committee. The full Senate has the power to try all impeachments.

Contrast that to the language in the House impeachment power. There, it says that the House shall have the power of impeachment—that's all. The framers didn't care how the House presented its impeachment articles. They could flip a coin; they didn't have to have hearings; they could have trial by combat on them in the well of the House—whatever they wanted to do. But the Senate has to try the case. That is what the Constitution says.

Finally, I want to emphasize what the Senators who improved Impeachment Rule XI under which you are proceeding said, and what they understood this constitutional limitation to require. We have highlighted in our brief the key colloquy between Senator Ashurst, who was the principal sponsor of the new rule and was then chairman of the Judiciary Committee, and Senator Austin of Vermont. Both men agreed that Rule XI raised serious Constitutional issues. Senator Ashurst made clear that trial by committee was never, never intended to be forced on an impeachment respondent. He clearly stated that trial by committee was intended only to be by consent of the accused.

Then, right after that, Judge Ritter did go to trial, and he went to trial before the full Senate, not before a committee.

The next impeachment was not for 50 years, when the *Claiborne* case came up. I don't know why the fact that this was intended to be a consent-based procedure was not followed up in the *Claiborne* case. It is my suspicion perhaps that the memory of the Senate had lapsed, and on one went back and looked and saw that was what the intent was.

We surely think you should be persuaded by the intent of the draftsmen of Rule XI to have this trial before the full Senate. We do not consent to trial before this committee. We ask only that you respect the provisions of the Constitution of that rule and the intent of the framers on it.

Finally, for this round, I just want to talk about the motion in limine that we have made. This is an attempt to restrict some of the evidence, prevent irrelevant matters from coming before the Senate.

We have submitted this motion with respect to two points. The first is the House managers' request that all of the trial transcript and exhibits and all of the House subcommittee transcripts and documentary exhibits be admitted into the Senate record.

The second is whether the Senate should sit through hours of testimony about oil and gas interest that Judge Nixon purchased from Wiley Fairchild, even though that purchase is the basis of no charge against Judge Nixon in this proceeding.

Let me start with the transcripts and the trial exhibits. I have prepared—and it wasn't much preparation—a visual display of what we are talking about.

This box is the trial record—transcripts and exhibits.

This box is the subcommittee record—transcripts and exhibits.

Out of curiosity, and prehaps a perverse interest in numbers, we went through an exercise in my office. The trial record consists of

2,900 pages of transcript and weighs 28 pounds. The exhibits are over 500 pages and weigh over five pounds—that is from the trial.

The subcommittee hearing, there are 1,400 pages of transcripts, weighing almost 15 pounds. There are over 1,500 pages of exhibits, weighing 19 pounds—those exhibits are identical to the trial exhibits, of course.

The grand total we came up with was 6,600 pages of transcripts and exhibits, weighing almost 70 pounds.

This is trial by forklife; this is not trial by evidence.

The House managers proposed that the taxpayers underwrite the reproduction of these materials for the 100 Senators, their staffs, the press, the public, the House managers, and I hope a couple for us, because we cannot affort to make so many copies of this stuff.

Assuming only 500 sets were produced—and I probably got carried away here—it would generate over 3 million pages of material, weighing more than 18 tons.

Well, what do you get out of that? You've got 4,300 pages of transcript, testimony. At least 40 percent of that, over 1,800 pages, is testimony of Bud Holmes, Wiley Fairchild, Carroll Ingram, and Judge Nixon. Those are the most central witnesses in this trial. And you are going to hear those witnesses at the trial, anyway—so what do you need those transcripts for?

Those transcripts also include irrelevant issues—an oil and gas investment issue I'm going to talk about is the subject of much of the testimony and exhibits. The House subcommittee had a day of hearings on a recusal question with Judge Nixon. To their credit, they determined not to go forward with any charge based on it.

But of course, I am struck as an advocate that the House managers have excluded from their motion the transcript of the hearing last August down in Jackson, Mississippi on our motion for a new trial, when Wiley Fairchild for the first time admitted under oath that he had lied at trial; he had given false testimony at the trial to help convict Judge Nixon in order to curry favor with the prosecutor. They want you to get all this staff and that stuff, but they don't want you to get the testimony that helps us.

We don't think there is any justification for this approach. In the Claiborne impeachment trial, which is the one precedent they cite where the trial record was admitted into the record, Judge Claiborne faced an Impeachment Article that he should be impeached and removed from office solely because he was convicted. That Impeachment Article failed—it was the only one—and it is clear that it failed because the Senate determined that it had had an obligation to make an independent determination and would not just rubberstamp the judicial outcome.

To support that article, though, submitting the trial record into evidence made some sense. We don't have such an article here—properly so—the Senate presumably would reject it here just as it did in the *Claiborne* case. And without such an article, there is no reason to submit all of this other stuff.

In fact, I can do no better than to quote from the argument of the House managers in the *Hastings* case, where they have objected to Judge Hastings' motion to have his trials record introduced. The chairs have been switched over there—Judge Hastings want the stuff in, and the House wants to keep it out. What they said there—what they told the Senate there—was that impeachment proceedings are separate and independent from the judicial process. The verdict of a criminal jury is not determinative, for otherwise it would undermine the sole power of the Senate to try all impeachments. And the key point here for us—the issue of what evidence was presented to the jury is wholly irrelevant, wholly irrelevant. I really couldn't have done better than that.

The **Chairman**. Ten more minutes, Mr. Stewart.

Mr. **Stewart**. Thank you, sir.

We propose that the Senate follow the practice it has followed in other cases. If either party has a good reason to ask that prior testimony be admitted, make a motion to do so—the witness is unavailable, if he is dead, if he is in another country and cannot be retrieved. I feel certain that that would be an adequate reason to present the testimony in transcript form—or, if there were a minor uncontested point as to which there is no issue of credibility, we might well be able to agree to have that transcript come in. We are very open to that.

But flooding the record with almost 70 pounds of materials is the lazy man's trial. That is leaving you, the Senate, to do the work of sifting through those 70 pounds of material and 6,600 pages, to find the relevant facts.

We want a trial. You have got to have a trial with the witnesses in front of you, where you look them in the eye, and you say, "I don't believe this guy" or "I do believe this guy" or "I don't have any idea whether I can believe this guy." That's what this trial is going to be about. It is not going to be about these boxes and boxes of documents.

The second point I wanted to talk about was the investment by Judge Nixon. Let me provide some quick background.

In the early 1980s, Judge Nixon bought oil and gas interests from Wiley Fairchild, a businessman in Hattiesburg, Mississippi. As oil investments sometimes do, this one paid off very well. Judge Nixon has had plenty of investments that did not pay off well; the law of average was such that he was bound to hit one sometime.

The investment was the initial focus of the Federal investigation. The prosecutors from Washington, DC apparently figured that any good investment by a judge in south Mississippi just had to be dirty. But there were aspects of this investment that drove the prosecutors from Washington, DC crazy throughout the case. First, it had been casually agreed to. It was not bristling with lawyers on both sides and accountants; it was not documented by reciprocal FAX transmissions on the same day; it was casually done.

Even more maddening to the prosecutors, it was publicly recorded. It was publicly recorded in Judge Nixon's name in the land records of Alabama and in the land records of Mississippi. It was also publicly reported in Judge Nixon's financial disclosures.

Now, how do you have a dirty deal that has been publicly reported, that took place in the clear light of day?

Even worse for the prosecutors, Judge Nixon paid interest on the loan that he made to buy the investment, and he even prepaid the interest. Again, how do you have a dirty deal when the guy prepays the interest? That is pretty frustrating if you are a prosecutor.

So the prosecutors couldn't charge a bribe; there was no evidence to support that. They came up with this amorphous crime, which was in the statutes—they are entitled to try—called a gratuity. A gratuity is an allegation that the public official has received more than he was entitled to and that there was some understanding or expectation that sometime in the future, somehow, some way, unspecified and unknown, perhaps, at the time, he would return the favor.

There was no evidence to support this allegation. During the trial, the prosecutor even told the press—we have submitted evidence on that—told the press that he didn't think the evidence was coming in very well on that count. The jury acquitted him and again, to the everlasting credit of the House managers, they did not present an Impeachment Article on this claim. They are good lawyers. I am sure they recognized that it was a loser. And it has not been presented to this Senate. So why should you care about it at this trial?

Look at the Impeachment Articles. Not one of them refers to the investment. You don't need to know anything about those oil and gas interests to figure out if Judge Nixon's statements were false or misleading. The statements alleged to be false had nothing to do with the investment. It is not as though he was accused of lying about the investments. They don't refer to the investment in any way.

Now, the House managers have tried to offer a reason why it is appropriate to submit evidence on it. They say "motive". That sounds pretty lawyerly. It was his "motive" to lie.

Let's look at it closely. This was a publicly reported investment. The prosecutors knew about the investment before they ever talked to him, and he admitted to them from the beginning that he had the investment. It was motive to lie in no way. It had nothing to do with this case and still has nothing to do with this case. I don't know why they think it does have anything to do with this case.

I have a suspicion that they think they've got kind of a dull, weak case, and they'd like to jazz it up, throw in this stuff about an investment and maybe hope it looks bad. But they haven't brought any charges based on it, and there is no reason to sit through the Chinese water torture we went through in the House subcommittee, where we crawled through every royalty check that Judge Nixon ever received, and we worried about whether it was endorsed and which bank account it went into, and we went through every oil and gas transfer document and who signed there, and what did this entry mean.

It has no relevance to whether he gave false testimony or made false statements.

The only other point I want to make at this time is with respect to discovery. We have been proceeding with discovery. I won't claim to be overjoyed with the way it is going, but it has gone adequately that we have found no need to submit anything to this Committee to ask for further help in terms of our relationship with the managers and their staff.

We have one issue which I have submitted which concerns the records of the Justice Department. The Justice Department has declined to make those available. I have understood from consultations with Senate staff that a procedure was developed in the Hastings matter to deal with this problem, which involving prescreening by Senate staff of materials for relevance and admissibility——

The **Chairman**. Involves what?

Mr. **Stewart**. Senate staff, as I understand it, in the Hastings matter—and I am subject to correction on this, sir; this is hearsay from the Senate staff——

The **Chairman**. I didn't understand what you said.

Mr. **Stewart**. That the Senate staff are looking at the Justice Department materials first, and then they are determining whether it is relevant to the issues in the case, and then, based on that screening, they are being released if they are deemed relevant by Senate staff. Essentially, the good offices of the Senate have been used as an intermediary between the impeachment Respondent and the Department of Justice. And we have asked that a similar procedure be applied in this case.

Thank you.

The **Chairman**. Thank you, Mr. Stewart.

On behalf of the House managers, Congressman Don Edwards of California.

Please proceed as you will, Mr. Edwards.

Mr. **Edwards**. Mr. Chairman, thank you.

I was the chairman of the subcommittee that handled the impeachment hearings in the House of Representatives.

I will first turn to Judge Nixon's motion to dismiss Article III, which is a very important matter, Mr. Chairman. In order to properly address Judge Nixon's motion to eliminate Article III, I must give you a little background of the case.

There are three key players in this case. One is Judge Nixon, a Federal judge in the Southern District of Mississippi, a man strapped, on the shorts, by his judicial salary—in his own words, "in dire need of supplement income."

The second key player is Wiley Fairchild. Mr. Fairchild is enormously wealthy, in the oil business and in the construction business. He likes to make political contributions and get close to influential people.

Wiley Fairchild gave Judge Nixon a lucrative investment opportunity. My colleague, Mr. Sensenbrenner, will describe the terms. Suffice it to say, it was a "sweetheart" deal, a very favorable opportunity. Judge Nixon was grateful for the opportunity. He knew he owed Mr. Fairchild a favor, and he told him so, saying, quote, "If there is anything I can do for you, I'll do it, and if I can't, I'll just tell you I can't."

Enter the third key player, Bud Holmes. Holmes had been a close friend of Judge Nixon for many years. They hunted, socialized together. Holmes was also the local prosecutor; he was the local D.A. at the time of this case.

As fate would have it, Wiley Fairchild's son, Drew, committed a crime. He was the assistant manager at the Hattiesburg airport, and was part of a conspiracy to smuggle a planeload of marijuana through Hattiesburg, and the local prosecutor who ultimately took charge of the *Drew Fairchild* case was Judge Nixon's old pal, Bud Holmes, the D.A.

Wiley Fairchild wasn't happy at all with the way Bud Holmes was handling the prosecution of his son's case. The case dragged on with much unfavorable publicity around Hattiesburg. Wiley thought Holmes was blackmailing him. So he cashed in on the favor. He met with Judge Nixon. In his meeting with Judge Nixon, Wiley Fairchild complained to Judge Nixon about being blackmailed by Holmes in connection with Drew's case.

The same evening, Judge Nixon visited Holmes, the judge related Fairchild's complaints. Holmes told Judge Nixon that a deal had already been worked out, that Drew Fairchild will plead guilty in return for a probation and a fine. But knowing that the judge was interested in more investments with Fairchild—which he was—and to help the judge in his financial relationship with Wiley Fairchild, Holmes instead agreed to keep the case under the rug, sweep the case under the rug.

Holmes told Judge Nixon he would "pass the case to the files", which in Mississippi means the case would become inactive, with no disposition at all.

Judge Nixon spoke with Wiley on the telephone that same evening; so did Holmes. "Everything will be taken care of to your satisfaction," Wiley Fairchild was told. Holmes told Fairchild that Judge Nixon deserved the credit, saying, quote, "When this man"—Judge Nixon—"asks me to do something, I don't ask questions; I just go ahead and do it."

On December 23, 1982, Drew Fairchild's drug smuggling case was passed to the files as promised. But a new judge took over the bench, and there was more publicity, more ugly publicity about the case. So the new judge reinstated to the active docket a month later.

The case drags on with no disposition, even though Drew Fairchild was pleading guilty.

In late 1983, the FBI gets a call. A confidential informant suggests there may be some tie between the Nixon-Fairchild investment and the strange handling of the Drew Fairchild marijuana case. The informant, who was an employee of Wiley Fairchild, points out that the Hattiesburg airport drug bust involving Drew Fairchild took place in August 1980, and the Nixon-Fairchild investment papers were not signed until February 1981. But the informant said that the deeds and notes in this oil deal were backdated one year, to date prior to the drug bust. Could this have been to cover up a possible bribe?

Well, the Department of Justice started an investigation. Early in the investigation, a Justice attorney and an FBI agent interviewed Judge Nixon in his chambers. Judge Nixon repeatedly denied any knowledge, any knowledge whatsoever, of Drew Fairchild or the drug case. He denied ever talking with Holmes about the case. Judge Nixon never even mentioned the meeting with Wiley Fairchild when he complained about being blackmailed by Bud Holmes. Judge Nixon never mentioned his meeting with Holmes. The judge never even mentioned the telephone call with Fairchild. All of his denials in this interview were categorical.

Later, Judge Nixon repeats these denials in testimony before the grand jury. Judge Nixon's failure to tell the truth to the grand jury led to his conviction on two charges of perjury.

The three Impeachment Articles before you are simple and straightforward. We are talking about a judge telling the truth. The first two articles track Judge Nixon's criminal convictions and focus on the same grand jury statements found to be false at Judge Nixon's trial.

Now, Article III alleges these statements, yes, along with other false or misleading statements by Judge Nixon in the interview with the FBI agent and the Department of Justice and before the grand jury. Some of these are new—a total of 14 statements—seven in the interview, those are new—that is one of the reasons why we had to have an Article III—and seven in his grand jury testimony. That is more than were in the perjury counts.

So they are all set out in Article III, all part of an effort by Judge Nixon to conceal his knowledge and investment in the drug case.

Article III also sets out the tragic consequences of his conduct. In Article III, we allege that by his conduct Judge Nixon disobeyed the law, soiled his own reputation, and undermined the integrity of the judiciary. Judge Nixon has moved to dismiss this article. But this motion should not trouble the Senate for several reasons.

First, Judge Nixon's motion is almost identical to a motion argued and voted upon by the Senate March 13th of this year in connection with the Hastings impeachment. Like Judge Nixon, Judge Hastings argued it was unfair to have an omnibus article that alleged misconduct set forth in earlier articles.

Like Judge Nixon, Judge Hastings claimed this omnibus article failed to state an impeachable offense. The Senate resoundingly rejected this argument by a vote of 93 to 0.

Second, Article III is patterned upon prior articles of impeachment voted on by the Senate in earlier cases. In every impeachment this century that has resulted in conviction, the Senate has voted in favor of an omnibus article that recites all of the judges' misconduct collectively, including acts separately alleged in earlier articles.

Frankly, Mr. Chairman, there is no better way to assess a judge's fitness on the bench than to examine his conduct in toto, and that is what Article III does.

Third, the specific language in Article III that Judge Nixon attacks, that language dealing with judicial integrity, is modelled upon prior Impeachment Articles. It is virtually identical to language used in the omnibus impeachment articles in the Ritter, Claiborne and Hastings impeachments. Judge Nixon objects to this language, but historical precedent shows that judicial integrity is what impeachment is all about.

Where—as here—a judge engages in misconduct that impugns his personal integrity and the integrity of the judiciary, he must be removed from office. Judge Nixon contends that the judicial integrity language is subjective. He complains that a judge should be impeached for being a member of the communist party, or engaging in extramarital affairs. But Article III doesn't allege such grounds for Judge Nixon's removal. Article III is very explicit in reciting the concealment of information through 14 specific statements, all of which can be proved, and the resulting effects on judicial integrity that warrant Judge Nixon's removal from office.

Finally, Judge Nixon, through his very competent attorney, Mr. Stewart, suggests that Article III is somehow unfair because it sets his conviction in this case. Of course, that is not true. The focus of Article III is Judge Nixon's own words. There is no trickery in Article III but the judge's own deception. Lying to grand jury is a crime. Lying to law enforcement officers in an interview to conceal information is also a crime. If such conduct does not warrant removal from office, what does?

Mr. Chairman and members of the committee, Article III is perfectly clear and soundly rooted in historical precedent.

We urge the Senate to deny Judge Nixon's motion to dismiss Article III.

Mr. Chairman, how much time did I use?

The **Chairman**. About 15 minutes.

Mr. **Edwards**. I have a brief response on the prior testimony which I think is important.

Mr. Stewart was objecting to the admission of prior testimony. Judge Nixon urges that all prior testimony be ignored and kept out of evidence unless a witness is unavailable, et cetera. Well, the House disagrees with that approach. We have moved to make the criminal trial and the subcommittee testimony the first two exhibits in the impeachment trial.

These are public records. They should be available to each Senator and his staff to review if they so desire. Admission of this prior testimony would ensure that all relevant facts are before the Senate so that your vote is a fully informed one.

We believe that freely admitting prior testimony will also help to streamline the trial. By granting our motion, the Senate can avoid duplicating the 2-week jury trial and reserve its own trial time for critical testimony and exhibits.

We urge the Senate to follow the practice of the Claiborne impeachment trial and admit prior criminal records into evidence.

This in no way prejudices Judge Nixon, for two obvious reasons. First, he is free to subpoena any witness he chooses for live testimony; and second, much of the trial and subcommittee record consists of Judge Nixon's cross-examination of witnesses. How can it be prejudicial to admit into evidence the prior testimony of witnesses when the judge has fully exercised his right of cross-examination?

Finally, Judge Nixon suggests that the House has taken contradictory positions concerning the use of prior testimony. This is simply untrue. As I have noted, in the Claiborne impeachment, the Senate made the criminal trial record an exhibit. Judge Hastings wished to introduce the record of his criminal trial, but only for narrow and limited purpose of establishing what evidence was before the jury that acquitted him. The House couldn't agree to this limited use of the transcript because Judge Hastings' motion was an effort to reopen the double jeopardy issue, which had been lost by a vote of the Senate.

So Mr. Chairman, we urge that the Senate admit prior testimony for such use as the Senate may see fit.

Thank you.

The **Chairman**. Mr. James Sensenbrenner, Congressman Sensenbrenner, of Wisconsin.

Mr. **Sensenbrenner.** Mr. Chairman and members of the Committee, I too am proud to have the privilege of representing the House in this matter and appreciate the opportunity to appear before you today.

Let me begin by addressing the House's motion to strike Judge Nixon's affirmative defenses of vindictive prosecution and prosecutorial misconduct and to exclude evidence pertaining to those defenses.

Judge Nixon's first affirmative defense is that he was unfairly targeted by the Justice Department because of his ruling against the Government in the *Petitibois Island* condemnation case. Judge Nixon raised this same claim in his post-conviction proceedings, yet his counsel admitted during the House impeachment proceedings that there is absolutely no evidence in support of this claim. Chief Judge Nangle, who heard Judge Nixon's post-conviction motion, also found no evidence to support it.

Significantly, Judge Nixon did not appeal the district court's rejection of his vindictive prosecution claim. From the standpoint of judicial proceedings, that issue has been fully and finally resolved.

The question thus is whether the Senate will agree to go down the road that the Judicial Branch has rejected and to consider a defense that Judge Nixon concedes there is no evidence to support.

In his response to the House motion, Judge Nixon pleads for additional time to develop this claim. Judge Nixon expresses the hope that he may find new evidence supporting his claim of vindictive prosecution and asks the Senate to delay ruling on the House's motion. We disagree.

The House respectfully suggests that it is time we start separating the wheat from the chaff in this case. Judge Nixon has been arguing his claim of vindictive prosecution both in the impeachment proceedings and in his post-conviction proceedings for more than a year, without on shred of evidence.

Judge Nixon should be required to come forward today and offer proof, not speculation or hope of finding evidence, but solid proof of a vindictive prosecution that would justify the Committee's probing into this area. Otherwise the issue should be dismissed.

If between now and trial, Judge Nixon should find significant new evidence, let him present the evidence to the Committee and ask for a reconsideration of this ruling. This is the logical approach to take on a defense that, even if proven, has no relevance.

Suppose that Judge Nixon's speculation were proven true? Suppose the real reason the Government began its investigation of Judge Nixon was that it didn't like his *Petitbois* condemnation ruling? Does that permit Judge Nixon to lie to Federal investigators about his contacts with Bud Holmes and Wiley Fairchild concerning the *Drew Fairchild* case? Does that allow the judge to lie under oath to the grand jury? Of course it doesn't.

Accordingly, we ask the Senate to strike the first affirmative offense and to exclude evidence on this claim of vindictive prosecution based on the *Petitbois Island* ruling. The investigation and subsequent proceedings that we are talking about here today was not about Judge Nixon's involvement in the *Petitbois* condemnation case, but on whether his investments with Wiley Fairchild were corruptly connected to Drew Fairchild's drug case and whether he lied in his testimony on that.

The House's position on Judge Nixon's second so-called affirmative defense is similar. His second defense is that the allegations against him were developed by Executive officials who improperly coerced and induced witnesses to give false testimony in violation of due process of law.

Again this defense raises a question—due process in connection with the criminal trial that is an issue for the courts and not the Congress.

Along with our motion, we have provided you with a copy of Chief Judge Nangle's opinion concerning this claim of prosecutorial misconduct. Judge Nixon lost on this due process issue in the district court, and his appeal is pending. Only the courts and not the Congress have the power to find a violation of due process in the criminal trial.

And let me emphasize this. Judge Nixon apparently wants the Senate to rule on something that should belong in the courts.

Agains, as you read Judge Nixon's second affirmative defense, you are left with the question: So what? Can prosecutorial misconduct excuse lying to law enforcement officers or lying to the grand jury? Does Judge Nixon cleanse himself by proving that others are also muddy?

We believe not. Walter Nixon, not the Department of Justice, was granted the high privilege of serving as a Federal judge. Walter Nixon, not the Department of Justice, swore to tell the truth, the whole truth, and nothing but the truth in the grand jury and then lied to conceal information.

Judge Nixon is on trial here and no one else. This so-called affirmative defense is nothing but a distraction. It is blue smoke and mirrors designed to keep you, the Senate, from focusing upon Judge Nixon's interview statements and Judge Nixon's grand jury testimony.

Judge Nixon would no doubt like to duplicate if not enlarge upon his post-conviction hearing. But this prosecutorial misconduct claim has nothing to do with Judge Nixon's interview and grand jury testimony.

What is important here is whether Judge Nixon's interview and grand jury testimony are false and misleading, as alleged by the House.

So we ask the committee to exclude evidence of prosecutorial conduct.

I turn now to Judge Nixon's motion in limine to exclude evidence concerning the Nixon-Fairchild oil and gas involvement. Frankly, it is not surprising that Judge Nixon wishes the Senate to disregard the facts concerning his investment with Wiley Fairchild. As Mr. Edwards has pointed out, this investment is the reason why Judge Nixon became involved in the Drew Fairchild drug smuggling case and sheds light on why he lied to investigators and to the grand jury.

It will be important for the Senate to understand how the Nixon-Fairchild investment involved and what the terms of that investment were; how Judge Nixon solicited the investment and received large royalty checks even as he was presiding over Federal litigation involving Wiley Fairchild's construction company without recusing himself or disclosing his financial relationship to the parties; how Judge Nixon never paid anything out-of-pocket for the investment, but instead borrowed from Fairchild's construction company at an interest rate of 5 percent below the rate banks were charging Judge Nixon at the same time on other loans; how documents were backdated to a date prior to the Hattiesburg drug bust involving Drew Fairchild; how Judge Nixon received over $60,000 in income from his $9,500 investment.

These are but a few of the suspicious facts concerning the investment. These facts will help put into conduct Judge Nixon's gratitude to Wiley Fairchild. They show why he offered to help Fairchild if he could. Evidence of the oil and gas investment is indispensable background evidence, and above all it will shed light on Judge Nixon's motive and intent in committing the acts charged in the articles, for it was only because of this financial relationship with Wiley Fairchild that Judge Nixon became involved in the Drew Fairchild drug case which was pending in State court, not Federal court.

As the Fifth Circuit noted in its opinion on Judge Nixon's appeal, the facts concerning the investment are necessarily intertwined with the evidence concerning Judge Nixon's false statements.

In his motion, Judge Nixon contends that the evidence concerning the oil and gas investment will unnecessarily prolong trial. This is simply not true. The same witnesses who established that Judge Nixon gave false statements also have knowledge concerning the investment. Only a little additional testimony will be needed, and if Judge Nixon would stipulate to the undisputed facts concerning the investment and his simultaneous handling of Fairchild's Federal litigation, trial time would be greatly reduced.

These facts are set forth in our stipulations 35 through 96, which Judge Nixon has refused to answer.

In sum, we strongly urge the Committee to deny Judge Nixon's motion in limine and to hear evidence concerning the oil and gas investment. Only by hearing this evidence can the Senate get a full and accurate picture of what happened and why Walter Nixon, Jr. must be removed from the Federal bench.

Thank you.

The CHAIRMAN. Just one moment. We have a vote.

What is the Committee's pleasure? I guess the best thing to do would be to go and come back as quickly as we can.

Senator CHAFEE. I think so.

The CHAIRMAN. We please urge all members to come back, and then we'll finish up here in about 15 or 20 minutes when you come back, but also have time for any questions of the panel of both sides.

[Recess.]

The CHAIRMAN. Gentlemen, excuse us. Of all things, on the Floor, we are in the midst of a Constitutional point of order, not a regular point of order or a procedural point of order, but a Constitutional point of order, which is being argued for 20 minutes, and then, unless they extent the time, will be voted on at 10 minutes to 5.

So I think in the interest of everyone's time this afternoon, if we can try to conclude in these next 15 minutes, because when we go again, we may not be able to come back.

Senator DANFORTH. Mr. Chairman, I do have some questions I'd like to ask. I'm not sure that everybody has to be here when I do it. But I would like to see if we could narrow the issues that are before us. Obviously, there has been more time that has been promised to counsel.

Senator REID. We may narrow them a little tomorrow with some of our rulings on the motions.

Senator DANFORTH. I thought if we could get maybe a little bit of focus by discussing some of the points in Article III, it is conceivable that we can at least figure out where we are going on the other issues.

The CHAIRMAN. Well, the Senators shall have that time.

Let me just ask the House, have you concluded? Did you conclude, Mr. Sensenbrenner?

Mr. SENSENBRENNER. I am finished, Mr. Chairman.

The CHAIRMAN. How much time does the House need to conclude its presentation?

Mr. CARDIN. I would think that I will take more than 3 to 4 minutes.

The CHAIRMAN. Let's do that, and then we'll go to questions, and then we will see where we are.

Senator DANFORTH. I think Mr. Stewart has rebuttal time, though.

The CHAIRMAN. Well, they both have rebuttal time.

Senator REID. Mr. Chairman, maybe we could have the rebuttal and then have questions, because then we wouldn't have to be here for some people's questions.

The CHAIRMAN. Let me think about it. Let's conclude the House's testimony first.

Mr. CARDIN. Mr. Chairman, I will be addressing three motions filed by Judge Nixon: his motion for immunity order to compel the testimony of Robert Royals, for funds to pay for the expenses of defending this impeachment, and for the trial by the full Senate rather than by committee, pursuant to Senate Rule XI. The first two were not orally argued by Mr. Stewart, so I'll be very brief.

Judge Nixon has asked the Senate to seek an immunity order to compel the testimony of Robert Royals. The House would have no objection to this request if Judge Nixon can respond to three points. First, does the judge intend to call Mr. Royals to testify? In his motion, Judge Nixon says he is undecided. Surely, he must make this decision before the Senate takes the unusual course to immunize Mr. Royals.

Second, is Mr. Royals' testimony relevant to the Impeachment Articles? In his motion, Judge Nixon says Mr. Royals has information that may corroborate the date when Wiley Fairchild complained to Judge Nixon that he was being blackmailed in connection with his son's case. Yet during the House impeachment proceedings, Judge Nixon argued that the date of the meeting was largely irrelevant to whether Judge Nixon made false statements, which is the focus of the Articles of Impeachment.

And third, it is unclear whether Mr. Royals needs to be compelled at all. At this point, there is no indication that he would refuse to testify if subpoenaed. He declined to testify at Judge Nixon's trial, but that was three-and-a-half years ago, when Mr. Royals was serving time for his participation with Drew Fairchild in the Hattiesburg drug conspiracy. Judge Nixon should at least come forward with a letter or affidavit from Mr. Royals stating that he will refuse to testify before the Senate takes the extraordinary step of immunizing him.

Let me turn briefly now to Judge Nixon's motion for defense funds. This is a matter within the Senate's sole discretion, and the House takes no position on this issue. But we would be remiss if we failed to note certain points not mentioned by Judge Nixon in his motion.

For example, you should be aware that never in impeachment history has the Senate awarded funds to an officer facing impeachment. In one case, that of Judge Swain, the Senate denied a request for funds even when the judge was acquitted from the impeachment charges.

You should also be aware of case law confirming the Constitution does not require you to grant Judge Nixon's expenses. These authorities are cited in our written response to this motion. And I cannot help but note that Judge Nixon, an incarcerated felon, who has not performed judicial duties since 1986, has collected more in salary since this impeachment proceeding began than he has spent in impeachment defense costs.

And finally, let me address Judge Nixon's motion for a trial before the full Senate that was argued. I understand that Judge Nixon has filed a lawsuit to try to compel the full Senate to hear this case. But clearly, how the case is to be tried is a matter within the Senate's sole discretion. The House is prepared to proceed whether you choose trial by this Committee or by the full body.

Of course, the Claiborne impeachment was handled by a committee, the Hastings impeachment is currently being tried before a Rule XI committee, and you have been assigned this task by action of the full Senate.

The House certainly agrees that this impeachment can be Constitutionally, fairly and efficiently tried before the Committee.

Thank you.

The CHAIRMAN. Thank you very much, Mr. Cardin.

Mr. Stewart, let me try to give you about 6 or 7 minutes for rebuttal.

Mr. STEWART. Thank you, sir. I'll try to be quick. I just have a couple of points I'd want to make.

First, in connection with the motion to dismiss Impeachment Article III, I want to quickly say that I take a second chair to no one in my regard for Chairman Edwards and the House managers. But there was a point Chairman Edwards made which I think is very relevant here. He said that Impeachment Article III was the perfect vehicle for assessing the fitness of Judge Nixon as a judge. That is not the question before you. That is not the question that the Constitution confides to you. The question is has he committed high crimes or misdemeanors—not his fitness for the bench.

Secondly, on the question of the oil and gas investment and the admissibility of it, I feel a little bit like maybe I came to the wrong argument. I was arguing the law, and they argued the facts, and maybe I should have been arguing the facts a little harder.

But when you fight through all these things that were laid out for you, there is still no connection between the investment and the charges. The only statement we have had is that the investment led Judge Nixon to know who Wiley Fairchild was, to know him. Fine, he could have been a law school classmate. He could have run into him at the feed store. He happened to know him this way. It is of no relevance to whether the statement is true or false.

On the prosecutorial misconduct point, their attack on our affirmative defenses. Quickly, on *Petitbois Island*, I am not telling you now I can prove that case. If I could prove it, it would be very significant because it would mean that a Federal judge can be targeted and can be targeted because he ruled against the Government, and that is something that Congress needs to know about.

All I ask is time to conduct discovery. If I cannot prove it, I will not attempt to. I have said that in our pleadings; I say it again here today.

On the prosecutorial misconduct, though, that is central to the case, and it is central because it is through that that you learn about the witnesses. Wiley Fairchild has said he lied at trial. He lied at trial because he was scared. He was scared because the prosecutor came down on him like a ton of bricks, indicted him for crimes that were not crimes, played on his concerns for his son, manipulated him with scripts. We found three scripts that were provided to Wiley Fairchild to reinforce his false testimony.

In order to decide whether you believe Wiley Fairchild or not, you have got to know about that. With Bud Holmes, you have got to know that he was told—he was told—you don't have to be indicted if you can give us something on Judge Nixon. You have got to know that in order to decide whether to believe Bud Holmes or not. It is central to the case, and in fact the case is about the investigation. The Impeachment Articles all relate to the investigation, so you have to inquire about that.

Finally, I do want to address Congressman Cardin's questions on the Royals matter, quickly. They are appropriate questions.

Do we intend to call Mr. Royals? I can't answer that now. I don't know. I haven't had a chance to go to Mississippi and meet with him. I don't know if he'll meet with me. I was advised by Senate staff that I should get a request on file to have the Committee know that I was interested in Mr. Royals' testimony. I cannot give you a square answer on that, and I do not know exactly when I will be able to.

Does Mr. Royals require immunity? I have spoken to him on the phone; he said he would not testify without immunity. If I need something in writing, I can ask him for something in writing. It did not occur to me that that was a requirement.

Is his testimony relevant? I do want to talk about this for a second. At trial, the central issue at trial was when was the phone call from Bud Holmes' farm to Wiley Fairchild and the conversations related to it. That was the entire trial. Both sides went to the jury by staking their case on that issue.

Two witnesses said it happened in 1982, Bud Holmes and Wiley Fairchild. Judge Nixon said it happened in March 1983. It is important because if it happened in March 1983, none of Bud Holmes' testimony works; it doesn't make sense, because he claims he told Judge Nixon he would pass the case to the files, which happened in December 1982. Why would he tell them that in March 1983? His story crumbles, and in fact he testified at trial that if the meeting happened, if the phone call happened, in March 1983, he is a liar. That was his word.

Now, after that trial, we were looking at a situation where Judge Nixon's testimony has always been it was March 1983, that's his recollection; the other witnesses were contrary. I went to the impeachment subcommittee, and I would make the same argument here today—even if the date is the way Bud Holmes says it, there is still no evidence, there is still not enough evidence to convict Judge Nixon. That was the argument I made then, and I would make it again today.

But the facts have gotten better for us. What has happened is Wiley Fairchild said, "Yes, I lied about the date, because I knew the prosecutor wanted me to lie." He didn't tell the prosecutor he was lying. I don't want to overstate it. "I knew the prosecutor wanted me to say that, so I said it was in 1982, but it was really in 1983."

And we found another witness—and why he wasn't found before, I can't tell you—Wiley Fairchild's brother and business partner. And he says, "Yes, it was in March 1983."

Well, what was a 2-on-1 against us is now a 3-on-1 in our favor, and now we think that is a central issue, and we are going to press that issue. It is centrally relevant to this case, and we will urge it at the trial.

Thank you.

Mr. SENSENBRENNER. Mr. Chairman.

The CHAIRMAN. Yes, please.

Mr. SENSENBRENNER. Mr. Chairman, I will be very brief in rebuttal to one of Mr. Stewart's arguments. The issue of the alleged false testimony of Wiley Fairchild and his recantation of testimony given at the trial was extensively dealt with in the evidentiary hearing in Judge Nixon's post-conviction motion for writ of habeas corpus. Chief Judge Nangle, who presided over that hearing, dealt with that extensively in his written opinion that is reported at 703 Federal supplement 560. And I will just quote two paragraphs.

First, it says:

> Petitioner alleges that Wiley Fairchild and Drew Fairchild testified falsely at trial about the four Government promises and the inducements which are described in section (e)(1) above. The court has found above that no such promises or inducements were made. Therefore, their testimony on these matters was not false.

Later Judge Nangle writes:

> For the reasons set forth in section (d) above, the court rejects Wiley Fairchild's attempted recantation with respect to Factual Issue 3. Petitioner has not established that Wiley's trial testimony on this issue was false. Thus Petitioner has not demonstrated that the Government knowingly used false testimony on this issue to obtain his convictions.

This was the trial court judge that was able to hear the testimony where Mr. Fairchild allegedly recanted his trial court testimony and determined that the credibility of the recantation was not sufficient to determine that Mr. Fairchild has given false testimony at the original trial altogether.

So the issue of Mr. Fairchild's alleged false testimony, alleged recantation, has been thoroughly dealt with by the trial court that heard that testimony, and thus I believe Mr. Stewart's argument fails.

The **Chairman**. Mr. Cardin?

Mr. **Cardin**. If I might just very quickly, Mr. Chairman, in rebuttal to the relevancy issue in regards to Mr. Royals, let me point out that——

Senator **Chafee**. Could you pull the mike in a little closer, please?

Mr. **Cardin**. Yes. In regards to the relevancy argument on the calling of Mr. Royals as a witness, we are talking about the relevancy of the judge influencing the case being passed to the file. That is relevant in two of the articles, but rather remotely. It is referred to in two articles, article II—it is one of many factors listed as a basis for Article II. It is 2 of the 14 issues involved in Article III. But I would just point out that the articles do not rise or fall on that particular point. It is a remote issue.

In regards to the date in question, the case was passed to the file in December 1982. The conversation between Judge Nixon and Wiley Fairchild from Bud Holmes' farm that might have influenced that decision, Judge Nixon said occurred afterwards, in March 1983. Bud Holmes has testified that it was in May 1982. Wiley Fairchild testified before December 1982, and attorney Ingram also refers to a conversation that took place prior to that date.

Robert Royals' testimony would indicate it was done sometime, supposedly, in 1981.

I would just point out that it is of minor importance in the total case, and I don't believe they have shown real relevancy.

The **Chairman**. Mr. Danforth will inquire.

Senator **Danforth**. I am going to ask both Congressman Edwards and Mr. Stewart would Article III state an impeachable offense if it just began on line 7 of page 22? In other words what I am saying is wouldn't it be an impeachable offense simply to allege that Judge Nixon made false statements to Justice Department and FBI personnel?

Mr. **Edwards**. Our answer is yes.

Mr. **Stewart**. We would agree with that. We have a couple of other problems with it still, but yes, that's correct.

Senator **Danforth**. All right. So would both of you concede that it is not necessary for us to find that this took place after entering into an oil and gas investment? In other words, the false statement itself is the impeachable offense. If it was done in order to conceal some knowledge with respect to an oil and gas investment, or if it was done for purely charitable motives, regardless of the motive, it is the false statement that is the impeachable offense.

Mr. **Stewart**. Senator, I would agree with you on that.

Senator **Danforth**. Do you agree with that, Mr. Edwards? In other words, all you have to prove, then, is the false statements, regardless of whether there was an oil and gas investment.

Mr. **Edwards**. I believe that we would have to insist, if we could, that the statement about the oil and gas investment would have to be included, because all of the following of the 14 false statements referred to that, releated to the oil and gas investment and the concealment thereof.

Senator **Danforth**. Thank you.

The **Chairman**. What is the pleasure of the committee?

Are there any other questions, or can we conclude for today?

Senator **Chafee**. Well, I'd like to ask Mr. Cardin, I just don't quite understand why it is so irrelevant whether Bud Holmes talked to him—or, the conversations with Bud Holmes were in 1982 or in 1983. It seems to me if the file had been put away or set aside, whatever the terminology they use, in December 1982, and the conversation was in March 1983, it would thus seem to indicate that he wasn't setting it aside pursuant to the conversation.

Mr. **Cardin**. Well, the point I was raising is that the emphasis of article II of the impeachment is that he made false statements, not that he influenced the decision or influenced the handling. That is one of the allegations that are made, true, but the emphasis of Article II is that he made false and misleading statements to a grand jury—the judge made false and misleading statements to the grand jury.

Senator **Chafee**. I see, regardless of——

Mr. **Cardin**. One of the subissues is whether he tried to influence the case being placed into the file.

Sentor **Mack**. Let me just follow up on that.

The **Chairman**. Senator Mack of Florida.

Senator **Mack**. If it is irrelevant about the timing——

Mr. **Cardin**. No, I don't mean—the timing is relevant, but it is not essential. If is not going to be the key element of whether the article succeeds or does not succeed.

Senator **Mack**. OK. Then, why do we need to then discuss the issues having to deal with the oil and gas leases—or, is that not related to this Article?.

Mr. **Sensenbrenner**. The oil and gas leases, Senator, are essential in showing the motivation of why a Federal judge would get involved in a State court cases——

Senator **Danforth**. But why do we care about that? The case, as I udnerstand it, is did the judge lie to a grand jury, and did he lie to Justice Department and FBI people; and we can just go into this matter forever if we get into the whole set of circumstances. I mean, if he lied, it is an impeachable offense; even Mr. Stewart has said that. If he didn't lie, then there is nothing charged. So I don't see why we can't just focus on the alleged false statements—did he made them, or didn't he?

Mr. **Sensenbrenner**. Well, the whole set of circumstances that brought about the false statements beign given to the investigators came about as a result of Judge Nixon going up to Bud Holmes' farm and talking to Bud Holmes about passing the case to the files. If that event did not happen, then we wouldn't be here today. And I believe that this is essential background, and the trial judge also determined that it is essential background in determining what Judge Nixon's motivations were.

Senator CHAFEE. Well, it just seems to me that if these conversations didn't take place before the file was set aside that it would seem to me the case would fail, wouldn't it? I mean, if the conversations with—I don't know all the details of this thing, obviously—but if the conversations with Bud Holmes took place in March of 1983, the case is quite different, isn't it?

Mr. SENSENBRENNER. Well, the answer to your question is no, because Judge Nixon stated both to the investigators and to the grand jury that he never talked to Bud Holmes at all about this matter, so the timing of when this conversation took place is not relevant because of the flat out unequivocal denial by Nixon that he talked to Bud Holmes about this matter altogether.

Senator CHAFEE. I see. Thank you.

The CHAIRMAN. To both parties, we thank you. We'll make our decision on the motions tomorrow, which I understand under the rules is in executive session, and your presence will not be required.

We will meet at 9:30 in the morning in S–211 in the Capitol.

[Whereupon, at 4:55 p.m., the committee was adjourned, to reconvene in executive session on Friday, July 14, 1989, at 9:30 a.m.]

COMMITTEE ACTION: FIRST ORDER

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United States Senate
IMPEACHMENT TRIAL COMMITTEE
(ON THE ARTICLES AGAINST JUDGE WALTER L. NIXON, JR.)
HART SENATE OFFICE BUILDING, ROOM SH-802D
WASHINGTON, DC 20510

IMPEACHMENT TRIAL COMMITTEE
DISPOSITION OF PRETRIAL MOTIONS
FIRST ORDER

The parties have filed several motions on pretrial issues, which they have supported and opposed by the submission of written memoranda and oral argument before the Committee. In disposition of these motions, the Committee has authorized the Chairman and Vice Chairman to issue the following rulings on its behalf:

Motion for Trial by the Full Senate

Judge Nixon has requested reconsideration of the decision to appoint this Committee to compile an evidentiary record pursuant to Senate Impeachment Rule XI. His motion for a full live evidentiary proceeding on the floor of the Senate, without the assistance of this Committee, rests on claims of both constitutional requirement and fairness. The constitutional arguments about the use of a Committee have recently been considered thoroughly by the Committee on Rules and Administration during the Hastings impeachment matter. The Committee's studied conclusion that the Constitution permits the Senate to appoint a Rule XI committee underlay the Senate's decision both in the Hastings matter and in this one to use a committee to compile an evidentiary record. The courts have confirmed the Senate's discretion to use a committee to assist it in impeachment matters.

To the extent that Judge Nixon's objection to the use of a committee rests on the existence in this case of important issues of credibility of witnesses, we note that Judge Hastings' case presents no less important issues of witness credibility. The Hastings Impeachment Trial Committee accepted the recommendation of the Committee on Rules and Administration to provide all Members of the Senate with as much opportunity as possible to view the Impeachment Committee's proceedings, including observing witnesses' demeanor, by broadcasting them live to all Senate offices and by videotaping them for later viewing. This Committee will adopt the same practice.

In short, by the adoption of Senate Resolution 128 establishing this Committee, the Senate has already determined that Rule XI is constitutional and that it should be used in this proceeding. This Committee does not have jurisdiction to alter the Senate's decision, and no useful purpose would be served by requesting the Senate to revisit its determination at this point. Rule XI preserves the right of the Senate, following the conclusion of this Committee's proceedings, to send for any witness and hear his testimony in open Senate or to have the entire trial in open Senate. Accordingly, to the extent that Judge Nixon's motion should be interpreted as a request that the Committee desist from its pending proceedings, the motion will be denied, without prejudice to his renewing it in accordance with Rule XI following this Committee's report of an evidentiary record to the Senate as mandated by Senate Resolution 128.

Motion to Dismiss Article III

Judge Nixon has moved to dismiss Article III on the grounds that it fails to state an impeachable offense, is duplicative, and is confusing. In recognition that the Committee lacks jurisdiction to dismiss any of the Articles of Impeachment, he has requested that the Committee refer this motion to the full Senate. Because the Senate recently denied a similar motion by Judge Hastings to dismiss the culminating Article in his case, no useful purpose would be served by referring Judge Nixon's motion to the Senate for resolution. To the extent that Judge Nixon's motion to dismiss rests on the repetition of elements of earlier articles in Article III or on the inclusion of allegations of violation of general standards of misconduct warranting conviction in the view of the House, his motion seeks to present issues rejected by the Senate in the Hastings case.

The House's inclusion of statements of violations of general standards of misconduct in impeachment articles, like the initial two paragraphs of Article III, has never been understood to constitute factual allegations intended to be subject to evidentiary proof. The Committee similarly understands that the initial two paragraphs of Article III are prefatory and the allegations in Article III that are to be the subject of the evidence adduced by the parties are the allegations of false statements contained in Article III.

To the extent that the motion rests on the House's inclusion of fourteen distinct allegations of false statements in one article, we believe that Article III states an intelligible and adequately discrete charge of an impeachable offense by alleging that Judge Nixon concealed information concerning several conversations in which he had engaged by making "one or more" false statements to investigatory officials and "one or more" false statements to a grand jury. The House has substantial discretion in determining how to aggregate related alleged acts of misconduct in framing Articles of Impeachment and has historically frequently chosen to aggregate multiple factual allegations in a single impeachment article. The House's itemization of the fourteen particular statements whose knowing falsity it is alleging serves to give Judge Nixon fair notice of the contours of the charge against him without reducing the intelligibility of the article's essential accusation that Judge Nixon knowingly concealed material information from the government's law enforcement agents. Because the Committee believes that evidentiary proceedings may fairly be conducted on Article III as it is presently drafted, Judge Nixon's motion to refer his motion to dismiss Article III to the

Senate at this time is denied. Judge Nixon may press his effort to dismiss Article III before the full Senate after the conclusion of the Committee's proceedings. If the House wishes to redraft or revise Article III in light of Judge Nixon's objections and the possibility that he will renew them before the Senate, it is free to do so.

Motions Relating to Use of Prior Testimony

The parties have crossed motions on the use of prior testimony. Judge Nixon has sought to exclude all use of prior testimony, whether from his criminal trial or from the House's impeachment proceedings, unless needed to impeach or refresh a witness or to substitute for an unavailable witness. The House has moved to accept into evidence the record of all prior testimony and exhibits in its entirety. The Committee believes that introduction of the record of prior testimony and exhibits will be useful to enable the Committee to focus the live testimony that it hears on the most critical witnesses. The prior testimony has been the subject of adverse cross-examination, and its use will not prejudice any party. In accordance with the House motion and in the interest of a thorough and fair proceeding, all testimony and exhibits in Judge Nixon's criminal proceeding, including the post-trial proceeding (as requested by Judge Nixon), will be admitted, as well as all testimony and exhibits admitted in the House impeachment proceeding.

Motions to Exclude Evidence

Both Judge Nixon and the House Managers have moved to exclude particular areas of inquiry from the evidentiary proceedings. Judge Nixon seeks to exclude evidence of his oil and gas investments with Wiley Fairchild. The House seeks to exclude evidence of prosecutorial misconduct or vindictiveness. These motions are premature. Neither party has yet had an opportunity to specify what evidence, if any, in the disputed categories it wishes to present. Each party will have such an opportunity when it files its pretrial statement.

In addition to the other material that should be included in the pretrial statements, Judge Nixon shall include a particular issue proffer for the categories of prosecutorial vindictiveness and prosecutorial misconduct, in which he indicates what facts, if any, he intends to prove and how they are relevant to these allegations and to the Articles of Impeachment, what witnesses he desires to call, what he specifically expects them to testify to, and how long he anticipates their testimony will take.

In light of the Committee's ruling admitting prior testimony, the House shall include in its pretrial statement a particular issue proffer in which it indicates what facts it intends to prove relating to Judge Nixon's oil and gas investments, which of those facts may be established through prior testimony or stipulations, which of these facts require live testimony, which witnesses it desires to call, specifically what it expects them to testify to, and how long he anticipates their testimony will take. The Committee will defer disposition of these motions pending these submissions.

Motion for Defense Funds

Judge Nixon has moved for the Senate to reimburse him for the costs of his defense, including all out-of-pocket costs and his attorneys' fees at the rate of $75 an hour. The Committee has no authority to grant this request. In accordance with unbroken Senate practice, the Committee declines to recommend to the Senate that it grant Judge Nixon's request for funds with which to conduct his defense. Judge Nixon may renew his request for defense funds at the close of the Senate's proceedings on the Articles of Impeachment. The Senate will follow its usual practice of paying the costs of bringing the witnesses for whom it issues subpoenas to Washington to testify in this proceeding.

Motion to Immunize a Witness

Judge Nixon has advised that he may wish to call as a witness Robert Royals, who declined to testify at Judge Nixon's criminal trial on the basis of his privilege against self-incrimination. The Committee will defer determining whether to obtain an immunity order until it has become clearer whether Royals' testimony will be necessary. If

Judge Nixon determines to place Royals on his witness list, he should accompany that designation with a formal description of the effort that he has made to determine whether Royals will assert a Fifth Amendment privilege. In the meantime, the Committee will take the necessary action to enable it to obtain an immunity order in an expeditious manner at a later date should that prove necessary.

Stipulations

The parties have made some progress in stipulating to uncontested facts, but additional progress is expected. Judge Nixon has objected to a number of the House's proposed stipulations on the grounds that they are biased, inaccurate, or incomplete. With regard to the proposed stipulations that are the subject of such objections, the House should determine whether it is possible to reformulate them to meet Judge Nixon's objections. Judge Nixon should assist the House in that effort by detailing the specific bases for his objections. The parties should work together in this process to achieve additional progress, rather than simply exchanging fixed positions. The Committee's deferral of Judge Nixon's motion seeking to exclude evidence on his oil and gas investments should not prevent the parties from attempting to make progress on these stipulations, as well as the others. Any stipulations agreed to in this area will be understood to remain subject to Judge Nixon's objection as to relevance, until the Committee rules on that issue.

Pretrial Statements

The Committee has authorized the Chairman and Vice Chairman to issue a further order detailing the specifications, in addition to those described earlier and in this order, of the pretrial statements due on July 31.

Wyche Fowler Jr. Orrin G. Hatch

Wyche Fowler, Jr., Chairman Orrin G. Hatch, Vice Chairman

Dated: July 25, 1989

ACCESS TO GRAND JURY MATERIALS

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United States Senate
IMPEACHMENT TRIAL COMMITTEE
(ON THE ARTICLES AGAINST JUDGE WALTER L. NIXON, JR.)
HART SENATE OFFICE BUILDING, ROOM SH-802D
WASHINGTON, DC 20510

July 26, 1989

The Honorable John F. Nangle
Chief Judge
United States District Court for the
Eastern District of Missouri
319 U.S. Court House and Custom House
St. Louis, Missouri 63101

Dear Chief Judge Nangle:

We are the Chairman and Vice Chairman of the Impeachment Trial Committee of the U.S. Senate appointed to receive and report evidence to the Senate on the articles of impeachment that are pending against Judge Walter L. Nixon, Jr. The committee was appointed pursuant to Senate Resolution 128, 101st Cong., 1st Sess. (1989) and Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, S. Doc. No. 101-8, at 11. The committee's evidentiary proceedings are scheduled to begin on September 6, 1989.

On November 2, 1988, Peter W. Rodino, Jr., then-Chairman of the Committee on the Judiciary of the U.S. House of Representatives sent you copies of the official documentation of these proceedings as part of his request for an order pursuant to Fed. R. Crim. P. 6(e), that was granted by you on December 5, 1988. This letter formally requests under Rule 6(e) that you authorize the Department of Justice to grant this committee access to grand jury materials of the special grand jury of the United States District Court for the Southern District of Mississippi empaneled in Hattiesburg on July 18, 1984. A proposed draft order is enclosed for your consideration. As time is of the essence we respectfully request you expedite consideration of this request.

The Department of Justice has permitted a staff representative of the committee to review the department's files concerning the prosecution of Judge Nixon as part of the committee's pre-trial discovery proceedings. At the request of Judge Nixon, and with the concurrence of the department, the committee staff representative will screen those documents to identify those that are to be transmitted, subject to approval and redaction by the Department, to counsel for Judge Nixon for use in defense of the impeachment charges.

James Cole of the Justice Department has informed committee counsel that documents and files in question include information generated in the grand jury and has urged the committee to request an appropriate 6(e) order because the order obtained by Mr. Rodino only explicitly authorized access to the House Committee on the Judiciary. Review of these materials will assist the Senate in ensuring a fair, and impartial trial of the charges against Judge Nixon. In addition to the Department of Justice, counsel to Judge Nixon and the House of Representatives do not oppose this request.

If the Court has any questions concerning this request please contact the Committee's Counsel Donald A. Purdy, Jr., at (202) 224-4045, or Assistant Senate Legal Counsel Morgan Frankel at (202) 224-4435.

Sincerely,

Wyche Fowler Jr.
Wyche Fowler, Jr.
Chairman

Orrin G. Hatch
Orrin G. Hatch
Vice Chairman

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

In re: Proceeding of Special)
Grand Jury (Hattiesburg) of)
July 18, 1984) No. H88-0052(G)

ORDER

IT IS HEREBY ORDERED pursuant to Fed. R. Crim. P. 6(e) that the letter request of the Honorable Wyche Fowler, Jr. and Orrin G. Hatch, Chairman and Vice Chairman of the Impeachment Trial Committee (on the Articles Against Judge Walter L. Nixon, Jr.) of the United States Senate, for access to certain grand jury materials and other documents, is granted as follows:

(1) the United States Department of Justice is authorized to make available to a duly authorized representative of the Impeachment Trial Committee for inspection and copying any documents directly relating to or derived from the investigation of the special federal grand jury empaneled in Hattiesburg on July 18, 1984, except that no material shall be provided which:

- a. would tend to identify unexposed informants or confidential sources;
- b. if released, could compromise an ongoing investigation;

c. could identify a sensitive investigative technique; or

d. would contravene the privacy of employees interviewed in an administrative capacity;

(2) all documents copied by the representative of the Committee shall be used only in the proceedings for the trial of United States District Judge Walter L. Nixon, Jr., subject to the rules of discovery and procedure adopted in the United States Senate relating to said impeachment trial proceedings and subject to the plenary power of the Senate in the conduct of the impeachment trial.

____
United States District Judge

Dated:

United States District Court
Eastern District of Missouri
316 U.S. Court House & Custom House
St. Louis, Missouri

John F. Nangle
Chief Judge

(314) 539-3603
FTS 262-3603

July 27, 1989

RECEIVED AUG 0 2 1989

The Honorable Wyche Fowler, Jr., Chairman
The Honorable Orrin G. Hatch, Vice Chairman
United States Senate
Impeachment Trial Committee
Hart Senate Office Building, Room SH-902D
Washington, D.C. 20510

Dear Senators Fowler and Hatch:

Enclosed please find order of court relating to your request concerning the Nixon impeachment proceedings now pending before you.

Sincerely yours,

John F. Nangle

John F. Nangle

JFN:bar
Encl.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

In re: Proceeding of Special Grand Jury (Hattiesburg) of July 18, 1984) No. H88-0052(G)

ORDER

IT IS HEREBY ORDERED pursuant to Fed. R. Crim. P. 6(e) that the letter request of the Honorable Wyche Fowler, Jr. and Orrin G. Hatch, Chairman and Vice Chairman of the Impeachment Trial Committee (on the Articles Against Judge Walter L. Nixon, Jr.) of the United States Senate, for access to certain grand jury materials and other documents, is granted as follows:

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- a. would tend to identify unexposed informants or confidential sources;
- b. if released, could compromise an ongoing investigation;

c. could identify a sensitive investigative technique; or

d. would contravene the privacy of employees interviewed in an administrative capacity;

(2) all documents copied by the representative of the Committee shall be used only in the proceedings for the trial of United States District Judge Walter L. Nixon, Jr., subject to the rules of discovery and procedure adopted in the United States Senate relating to said impeachment trial proceedings and subject to the plenary power of the Senate in the conduct of the impeachment trial.

John F. Nangle

United States District Judge

Dated: July 27, 1989

COMMITTEE ACTION: SECOND ORDER

WYCHE FOWLER, JR., GEORGIA, CHAIRMAN
ORRIN G. HATCH, UTAH, VICE CHAIRMAN
HOWELL HEFLIN, ALABAMA
TIMOTHY E. WIRTH, COLORADO
HARRY REID, NEVADA
CHARLES S. ROBB, VIRGINIA
HERBERT H. KOHL, WISCONSIN
JOHN C. DANFORTH, MISSOURI
FRANK H. MURKOWSKI, ALASKA
JAMES M. JEFFORDS, VERMONT
CONNIE MACK, FLORIDA
JOHN H. CHAFEE, RHODE ISLAND
ANTHONY L. HARVEY, ADMINISTRATOR
MORGAN J. FRANKEL, COUNSEL
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United States Senate
IMPEACHMENT TRIAL COMMITTEE
(ON THE ARTICLES AGAINST JUDGE WALTER L. NIXON, JR.)
HART SENATE OFFICE BUILDING, ROOM SH-802D
WASHINGTON, DC 20510

IMPEACHMENT TRIAL COMMITTEE
ORDER DESIGNATING CONTENTS OF FINAL PRETRIAL STATEMENTS
SECOND ORDER

By letter from the Senate Legal Counsel on June 9, 1989, the Committee informed the parties of the required contents of pretrial statements, due on July 31, 1989, and indicated that those specifications would be supplemented in greater detail. The Committee's First Order provided some additional requirements for the pretrial statements. This order contains further guidance from the Committee concerning the preparation of pretrial statements.

The parties' Final Pretrial Statements should do the following:

1. Statement of the Case. Provide a brief and general statement of the case as the party intends to present it at the impeachment trial proceedings.

2. Witnesses. List the names and addresses of witnesses whom the party wishes to call, with a statement of the nature of their testimony sufficient to illustrate the relevance of that testimony to these proceedings. If any expert witnesses are listed, provide a brief statement of the subject of their testimony and their qualifications as experts.

The Committee shall treat the inclusion of an individual's name on the witness list as a request to the Senate that a subpoena be issued to that individual requiring his or her appearance at the impeachment trial proceedings. Upon receipt of the Final Pretrial Statements, the Committee will determine which subpoenas shall issue.

Unless good cause be shown for failure to include a witness on the Final Pretrial Statement, the parties shall not be permitted to call as witnesses persons not listed on the Final Pretrial Statement. If a party believes that there is good cause for naming additional witnesses after the Final Pretrial Statement has been filed, it shall, as soon as such witnesses become known, file with the Committee, and serve on opposing counsel, the names and addresses of those witnesses, the subject matter of their testimony, and show good cause for their late addition to the witness list. The requirements of this paragraph shall not apply to rebuttal witnesses.

Information concerning the parties' intended order of proof will facilitate the Committee's orderly issuance of subpoenas. The House is requested to indicate, to the extent currently possible, the order in which it intends to call its witnesses during the direct presentation of its case, and the estimated duration of each witness's direct testimony. In the event that this information should change in the time before commencement of the impeachment trial proceedings on September 6, 1989, the House shall promptly advise the Committee of that fact.

Judge Nixon is similarly requested to estimate the duration of the direct testimony of each witness and, to the extent that he is able, the order in which he anticipates calling them. He also shall timely inform the Committee of any changes in these expectations. If Judge Nixon determines to place Robert Royals on his witness list, he shall accompany that designation with a description of the effort that he has made to determine whether Royals will assert a Fifth Amendment privilege and the results of that effort.

3. Issue Proffer. Include an issue proffer as described in the First Order. For each of the categories of prosecutorial vindictiveness and prosecutorial misconduct, Judge Nixon shall state separately what facts, if any, he intends to prove and how any such facts are relevant to his affirmative defenses and to the Articles of Impeachment. Judge Nixon shall identify any witnesses through whose testimony, live or prior, he seeks to prove those facts, and provide as specific a statement as possible as to what he expects each witness's testimony to show.

The House shall state in its issue proffer what facts it intends to prove relating to Judge Nixon's oil and gas investments, which of those facts may be established through prior testimony or stipulations, which of those facts require live testimony, which witnesses it desires to call, and specifically what it expects each witness's testimony to show.

4. Prior Testimony. Supplement each party's witness list with statements identifying any particular prior testimony on which it wishes to rely. In accordance with the Committee's ruling in its First Order, the record of prior testimony from Judge Nixon's criminal proceeding and from the House's impeachment proceeding is being admitted into evidence in this proceeding in its entirety. The parties are encouraged to rely on such prior testimony, in lieu of seeking subpoenas for live witnesses, as they believe will achieve economies in the presentation of their case, without jeopardizing the fairness of these proceedings. For the witnesses from whom the parties seek live testimony, the parties shall also identify any prior testimony of those witnesses to which they wish particularly to direct the Committee's attention.

5. Exhibits. Provide a numbered index of exhibits which the party intends to offer at the evidentiary hearings. The index should provide a specific description of each listed document or item of evidence, and, if the document or item of evidence has previously been introduced in related prior proceedings, such as in United States v. Nixon or in the House impeachment proceedings, a citation to the particular location in the prior record where the document or item of evidence was introduced.

Both parties shall, on or before August 4, 1989, file and serve a statement for each document or item of evidence listed on the opposing party's exhibit list unequivocally stating whether objection is made to admission of that document or item without need for formal proof as to its authenticity or genuineness, and where appropriate, its status as a record of a regularly conducted activity or a public record. In the event that such objection is made, the basis for the objection and the reason therefore shall be specifically stated.

The Committee will review the foregoing statements and will enter an order stating whether, for each particular piece of evidence, the party offering the evidence need submit formal proof as to its authenticity, genuineness, or status as a record of a regularly conducted activity or a public record. Failure by the opposing party to make a reasoned and specific objection to any particular document or item of evidence will result in a finding by the Committee that formal proof need not be made, but will leave the evidence subject to all other objections. It should also be noted that a finding that formal proof need not be made does not relieve the offering party of the need to explain the content or meaning of the document, should the party believe that such explanation is necessary.

Unless good cause be shown for failure to include a document or other item of evidence on the index of exhibits, documents or items not listed thereon shall not be introduced at the impeachment trial proceedings. If a party believes that there is good cause for amending its index of exhibits, it shall, as soon as the need for the amendment becomes known, file with the Committee, and serve on opposing counsel, an amendment to the index together with copies of any new exhibits and a showing of good cause for their late inclusion on the index. The opposing party shall, three days after receipt of any such amendment, file and serve its objections regarding matters of formal proof to the exhibits included in the amended index.

The House shall provide copies of its numbered exhibits to Judge Nixon and to the Committee, on or before August 7, 1989. Judge Nixon shall provide copies of its numbered exhibits to the House and to the Committee on or before August 10, 1989.

6. Conduct of Evidentiary Proceedings. State the amount of time which each party intends to allocate to direct testimony, whether by prior or live testimony, and state whether its preparation has caused it to anticipate any particular difficulties in the presentation of its case of which the Committee should be made aware.

7. Legal Matters. Set forth the legal principles which each party believes is applicable to each article of impeachment and which the party believes should guide the Committee in determining the relevance and assessing the importance of particular evidence.

Wyche Fowler Jr.
Wyche Fowler, Jr.
Chairman

Orrin G. Hatch
Orrin G. Hatch
Vice Chairman

July 27, 1989

PRETRIAL FILINGS: PRETRIAL STATEMENT OF BOTH PARTIES

IN THE SENATE OF THE UNITED STATES
Sitting As A Court Of Impeachment

In re IMPEACHMENT OF WALTER L. NIXON, JR.	)

JUDGE NIXON'S PRETRIAL STATEMENT

EXECUTIVE SUMMARY

I. Factual Background -- This case concerns several brief exchanges on a single day in March 1983. That afternoon Judge Nixon visited Wiley Fairchild, a Hattiesburg businessman who complained that the local prosecutor, Bud Holmes, was blackmailing him by publicizing the drug prosecution of his 45-year-old son, Drew. When Judge Nixon stopped by Holmes' farm that evening, he mentioned Wiley's complaint to Holmes; Holmes offered to tell him about Drew's case, but Judge Nixon stopped him from doing so. Holmes then called Wiley on the telephone and assured him that Drew's plea bargain with the state would be honored, and Judge Nixon spoke briefly with Wiley as well.

The 1984 investigation of Judge Nixon concerned allegations that Wiley had bribed Judge Nixon with lucrative oil properties to "fix" Drew's drug case. Those allegations, which were completely false, were leaked to the press and created a climate of near-hysteria. When Judge Nixon was interviewed by investigators and testified voluntarily before the grand jury, he angrily denied those allegations. During the interview and the grand jury testimony, Judge Nixon did not think to mention Wiley's blackmail complaint, which appeared to involve another matter.

Both Wiley Fairchild and Bud Holmes were indicted by federal investigators on charges of lying to the grand jury, and then were given lenient plea bargains in return for their "cooperation" with prosecutors. After making their plea deals, both men changed their testimony about that day in March 1983 to coincide with the prosecution theory against Judge Nixon. Wiley Fairchild, who solicited and received several informal promises of assistance from the prosecutors, has admitted that -- through this process -- he was induced to give false testimony against Judge Nixon at trial.

II. Legal Principles -- The House Managers bear the burden of proof in an impeachment trial, and must completely satisfy the Senate that Judge Nixon has committed specific "high crimes or misdemeanors." That stringent burden of proof requires that the House Managers establish (i) that Judge Nixon did make "false and misleading statements," (ii) that the statements were "material" to the investigation, and (iii) that Judge Nixon made the statements with an actual intent to conceal information from and deceive the investigators and the grand jury. The jury verdict in Judge Nixon's trial, which was based on perjured testimony, can play no role in the Senate's deliberations.

III. The Articles Of Impeachment -- The House Managers cannot prove that Judge Nixon made material false statements, or that he intended to deceive the investigators. The essential charge against Judge Nixon is that he failed to volunteer a description of the exchanges in March 1983 concerning Wiley's blackmail complaint. That information was not volunteered, first, because it was never squarely asked for: As Judge Nixon knew, the investigation concerned the allegation that he had been bribed to "fix" Drew's case, or at least to steer it from federal authorities to local prosecutor Holmes. Those allegations were totally false, and Judge Nixon heatedly denied them; in that context, he reasonably did not think to mention the exchanges concerning Wiley's blackmail complaint.

Moreover, there is no basis for concluding that Judge Nixon's statements were intended to deceive the investigators or grand jurors. First, his statements reflected reasonable interpretations of the questions and of the investigation to date, so they may easily be understood as a good-faith attempt to address the matters raised. Moreover, the exchanges concerning Wiley's blackmail complaint were hardly a secret. At least four people -- Judge Nixon, Wiley, Bud Holmes, and lawyer Carroll Ingram -- all knew about the thoroughly inconsequential and entirely legal events of that day in March 1983. Judge Nixon could have no reasonable expectation that those events would remain secret if only he lied to the grand jury; accordingly, there was no reason for him intentionally to lie about it.

Impeachment Articles II and III seriously misstate Judge Nixon's actual statements, and the Senate must carefully compare his statements to the distorted allegations presented by the House Managers. In addition, Article III largely duplicates the first two Articles.

INTRODUCTION

The Articles of Impeachment charge Judge Nixon with making false statements when he did not volunteer certain information during grand jury testimony and in an interview by federal investigators. To convict Judge Nixon, the Senate must conclude both (i) that his statements were not accurate and truthful, and (ii) that he intentionally misled his questioners. Because the facts do not support either conclusion, the Senate must reject the Articles of Impeachment.

After reviewing the factual background, this Pretrial Statement will explain the legal principles that apply here, and will examine each of the specific allegations against Judge Nixon. We also submit separately our lists of potential exhibits and potential witnesses (with designation of relevant parts of the record), and an Issue Proffer concerning prosecutorial misconduct.

I.

FACTUAL BACKGROUND

A. A Day In March 1983

Judge Nixon is accused of intentionally concealing two brief and largely immaterial conversations on a single day in March of 1983. In the first conversation, Wiley Fairchild, a Hattiesburg businessman from whom Judge Nixon had purchased oil properties, complained that local prosecutor Paul "Bud"

Holmes was blackmailing him by publicizing the drug prosecution of his son, Drew Fairchild.

That evening, while Judge Nixon visited Bud Holmes at his farm outside of Hattiesburg, he mentioned Wiley Fairchild's blackmail complaint. Holmes said that Wiley was crazy and offered to tell Judge Nixon about Drew's case, but the judge told Holmes that he did not want to hear about it. Holmes then called Wiley Fairchild and explained that he intended to honor his plea bargain with Drew. Judge Nixon also had a brief exchange with Wiley Fairchild on the telephone.

That's it. That's all that happened. Nobody received any money. Nobody got preferential treatment. The public interest in honest and fair government was not injured in any way. No public official violated his duties. Drew Fairchild's plea bargain did not change. Indeed, nothing ever happened in Drew's case because of the exchanges on that day in March of 1983.

B. The Investigation

Beginning in late 1983, a disgruntled former employee of Fairchild Construction began making anonymous telephone calls to the FBI falsely accusing Judge Nixon of taking bribes from Wiley Fairchild to "fix" the Drew Fairchild drug case. The former employee, Skip Jarvis, had married Wiley Fairchild's grand-niece and had unsuccessfully tried to oust Wiley from the multimillion-dollar family business. Now Jarvis enlisted the federal government in his vendetta against Wiley.

Two aspects of the Drew Fairchild case attracted the investigators' attention. First, the federal government had prosecuted three of Drew's co-conspirators in the drug-smuggling conspiracy, who were arrested in August 1980, but had never brought charges against Drew. When state prosecutor Holmes indicted Drew in August 1981, a year had passed since the federal government learned of Drew's involvement in the conspiracy.

Second, Drew pled guilty to the state charge in January 1982, but still had not been sentenced. In fact, in December 1982, Holmes won a court order "passing the case to the files," a Mississippi procedure ordinarily not used when the defendant has pled guilty. The December 1982 order passing Drew's case to the files had no substantive effect, however, because Holmes recalled the case from the files thirty-three days later, in January 1983.

Following up on Jarvis' unsubstantiated allegations, two federal investigators interviewed Judge Nixon at his office in April 1984. They told him they were investigating (i) the oil properties he had purchased from Wiley Fairchild, (ii) the handling of the Drew Fairchild case and how the case was steered from federal authorities to Bud Holmes, and (iii) whether there was any connection between those two matters. Judge Nixon told them that he knew of nothing wrong with the transaction in which he bought the oil properties, and that he did not know Drew Fairchild. Judge Nixon also said that he had read about Drew's case and heard something about it, but had no real involvement in it.

After the interview, the investigation became front-page news in Mississippi. Through a combination of official leaks and overheated journalism, a climate of hysteria developed. Skip Jarvis' irresponsible accusation was trumpeted in the newspapers and on television news. As a sitting judge, Judge Nixon felt he could not defend himself. The situation finally became so impossible that a gag order issued, placing the federal investigators under threat of contempt if the leaks continued.

In this supercharged atmosphere, Judge Nixon demanded the right to appear before the grand jury that was being assembled, so he could explain his purchase of oil properties from Wiley Fairchild. He was the first witness before the grand jury, appearing on a completely voluntary basis on July 18, 1984. He brought with him his documentation of the oil transaction, and answered all questions on that subject. He repeated his limited knowledge of the Drew Fairchild case and again disclaimed any involvement in the case.

C. Changing The Witnesses' Testimony

Investigations like this one have a "target," or as Skip Jarvis put it, "the big prize." The big prize was Judge Nixon. From the outset it was clear that the most important potential witnesses against him were Wiley Fairchild, from whom he purchased the oil properties, and Bud Holmes, the prosecutor in the Drew Fairchild case. But those witnesses said nothing incriminating about Judge Nixon when they testified before the grand jury in July 1984. The witnesses' testimony had to change.

First, Wiley Fairchild was indicted for paying Judge Nixon an illegal gratuity and for false declaration before the grand jury. Although Wiley did not think he had done anything wrong, the indictment terrified him and he began negotiations with the government. The federal investigators told him he had to produce a "smoking gun" on Judge Nixon, and Wiley "lay awake nights" trying to think up something incriminating about Judge Nixon. Wiley remembered the phone call he had received from Bud Holmes and Judge Nixon, and immediately told the investigators about it.

Wiley's initial version of the phone call from Holmes' farm was considerably different from the version he recounted at trial. Wiley originally said that Holmes had placed the call, and he did not say that the call occurred before Drew's case was passed to the files in December 1982. But when Wiley gave his evidence to federal investigators, they told him that the story was not good enough. He understood that he had to change the date of the phone call, and had to change who had placed the call, and had to change the date of his first conversation about selling oil properties to Judge

Nixon. See "Judge Nixon's Issue Proffer: Prosecutorial Misconduct."

Frightened and eager to please the prosecutors, Wiley changed his testimony. The prosecutor helped create chronologies and scripts for Wiley to study to learn his new testimony. Outlines and chronologies in the prosecutor's handwriting have been found in Wiley's files. The most complete chronology -- a joint production of the prosecutor and Wiley's assistant, John Baltar -- was found both in Wiley's files and (only last week) in the Justice Department's files.

After Wiley recited his new testimony before the grand jury in late November 1984, the prosecutors kept Wiley in line with numerous promises of assistance. These promises included (i) help with a pardon, (ii) help with Wiley's eligibility for federal contracts, and (iii) the possibility of dropping the charges against Wiley even after he pled guilty. The prosecutors' most effective tactic, however, was their promise to help Drew Fairchild and their later action to shield Drew when the state prosecution threatened to put him in jail for five years.

With Wiley's testimony turned around, the prosecutors went after Bud Holmes. They told Holmes that he did not have to be indicted if he could make the case against Judge Nixon. When Holmes did not respond, they brought a five-count perjury indictment against him even though several of the charges -- as the lead prosecutor later admitted -- could not be proved. Then, on the second day of trial, Holmes bowed to the pressure and agreed to plead guilty to a single charge of contempt of court, under which he would pay a $10,000 fine and serve no jail time. Holmes immediately was rushed into the grand jury room and changed his statements on (i) the date of the phone call, (ii) who placed the call, and (iii) why he passed Drew Fairchild's case to the files in December 1982.

D. The Trial, The Date Of The Phone Call and Wiley's Recantation

The prosecutors then brought a four-count indictment against Judge Nixon, charging him with receiving an illegal gratuity and three counts of making false statements before the grand jury. During the trial, the date of the phone call from Holmes' farm was the key contested fact. Judge Nixon testified that the phone call and related conversations occurred on March 11, 1983, which was about six weeks after Drew Fairchild's case was restored to the active docket.

Holmes testified that the phone call occurred almost a year earlier, on May 14, 1982, and that he told both Judge Nixon and Wiley Fairchild that he would pass Drew's case to the files. (Neither Nixon nor Wiley remembers such a statement by Holmes.) Holmes also testified that when the case was passed to the files seven months later, he did it because of a request from Drew's lawyer, Bill Porter, and also because of the promise he supposedly made to Wiley during the telephone call from the farm. Holmes admitted, however, that if the phone call happened after December 1982, he was lying.

Wiley testified on direct examination that the phone call occurred before Drew's case was passed to the files. But on cross-examination he agreed that the phone call had to have occurred after the case was passed to the files, because the publicity over that event triggered his blackmail complaint to Judge Nixon. Then Wiley reversed himself again, and announced that the phone call occurred before Drew's case was passed to the files.

In closing arguments, both sides "staked their cases" on the date of the phone call. As the prosecutor told the jury, Judge Nixon's lawyer "stakes his case on the fact it took place after [Drew's case was passed to the files], we stake our case on the fact that it went before." The jury acquitted Judge Nixon on the gratuity charge and one false statement count, and convicted him on the two remaining false statement charges.

At a post-trial hearing last August, Wiley admitted that he lied at trial on the date of the phone call, and on other matters. He testified that the phone call actually had occurred after Drew's case was passed to the files. In a horrible irony, the jury relied upon false testimony in convicting Judge Nixon of giving false testimony.

II.

THE HOUSE MANAGERS' BURDEN OF PROOF IS SUBSTANTIAL

A. The House Must Prove Actual High Crimes or Misdemeanors

The impeachment power is strictly limited to cases of "Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Const., Art. II, Section 4. That constitutional limitation deserves special consideration here.

The House Managers tend to stray beyond the issue whether Judge Nixon committed particular offenses, seeking instead to provoke a generalized sense of unease or even embarrassment over the prospect of Judge Nixon's remaining on the bench. The very Articles of Impeachment invite the Senate to remove him from office for allegedly raising "doubt" as to his "judicial integrity," having "betrayed the trust" of the people of the United States, and having "undermined confidence" in and "brought disrepute on" the entire judiciary.[1]

The Constitution and simple fairness, however, do not permit the Senate to convict Judge Nixon because of vague feelings that he acted inappropriately or dishonorably or even unlawfully. The House must prove that Judge Nixon committed "high Crimes and Misdemeanors," and the burden of proof lies squarely on the House Managers. These hearings are decidedly not a forum in which Judge Nixon must come forward and prove his worthiness to hold office, as would be the case in a confirmation hearing. Just as in a criminal trial, the prosecution must convince you that its claims are valid; Judge Nixon bears no comparable burden.[2] The Senate could disregard all evidence and defenses propounded by Judge Nixon and still acquit him when the House Managers fail to support their allegations with sufficient facts.

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[1] The Committee has ruled, however, that these charges are merely "prefatory" and not the subject of these proceedings. See Impeachment Trial Committee Disposition of Pretrial Motions First Order 4 (July 25, 1989).

B. A Stringent Standard of Proof Applies

Not only does the burden of proof lie with the House Managers, but the standard for measuring that proof must be demanding. Although that standard is not specifically stated in the Constitution, common sense dictates that the Senate must be mindful of the constitutional significance of this case. The impeachment process gives to the legislative branch the ultimate power over the judicial branch -- the power to fire. That power is absolute and wholly unreviewable. Perhaps more than any of the Constitution's other checks and balances, the impeachment provisions directly pit two coordinate branches of government against each other.

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[2] This point was made recently by the Chairman of the Senate Judiciary Committee during debate on the nomination of former Senator Tower as Secretary of Defense: "This is not a criminal trial, where the presumption of innocence is with the defendant and the burden of proof is with those who allege misconduct. Nor are we in an impeachment proceeding where I assume a similar standard should apply." 135 Cong. Rec. S2459 (daily ed. Mar. 9, 1989).

In ordinary civil litigation, the plaintiff must prove its case by a preponderance of the evidence. In criminal cases, where the stakes are much higher, the jury may not convict unless it is convinced of the defendant's guilt beyond a reasonable doubt. Although some have resisted applying to impeachments the beyond-the-reasonable-doubt criterion, there can be no dispute that the Senate must hold the House Managers to the utmost standard of proof of its allegations. See C. Black, Impeachment: A Handbook 17 (1974) (proposing a standard close to the "beyond a reasonable doubt" standard in criminal cases, and noting that "[a] unique rule, not yet named by law, may find itself, in the terrible seriousness of a great case.")

C. The House Cannot Establish The Elements Of The Offenses Charged

The stringent standard of proof must be applied to each of the three elements of the offenses alleged in the Impeachment Articles.

-- that Judge Nixon did make "false and misleading statements";

-- that the statements were "material" to the investigation;

-- that Judge Nixon made the statements with an actual intent to conceal information and deceive the investigators and the grand jury.

Unless the Senate is satisfied that each of these elements has been proved, Judge Nixon must be acquitted.

1. The Statements Must Have Been False Or Misleading

In challenging the accuracy of Judge Nixon's statements, the House Managers must prove that, in the context of the questions and the underlying situation, there was only one conceivable truthful response to the question. If there was ambiguity in the questioning or in the answer -- whether the ambiguity lies in specific words used or in the more general thrust of the questioning -- and Judge Nixon's responses are truthful under a plausible interpretation of the questioning, then justice and fairness require acquittal.

The courts often have reversed convictions for perjury because of ambiguous questioning by the prosecution. For example, in United States v. Tonelli, 588 F.2d 194 (3d Cir. 1978), the court held that, in responding to a question whether he had ever "handled" a check, the defendant interpreted that term to mean physical contact with the check, and his denial of "handling" in a broader sense was not false. Similarly, in United States v. Cowley, 720 F.2d 1037, 1043 (9th Cir. 1983), cert. denied sub nom. St. Clair v. United States, 465 U.S. 1029 (1984), the court held that the defendant's negative response to the question whether he "had" certain records was not perjurious because he thought he was being asked if he had the records on his person. [3]

In addition to actual ambiguity in the prosecutors' questions, the Senate must consider the highly charged atmosphere in which the questioning was conducted. As the Supreme Court has repeatedly cautioned:

> Under the pressures and tensions of interrogation, it is not uncommon for the most earnest witnesses to give answers that are not entirely responsive. Sometimes the witness does not understand the question, or may in an excess of caution or apprehension read too much or too little into it.

Bronston v. United States, 409 U.S. 352, 358 (1973).

The House Managers cannot establish that Judge Nixon's statements to the prosecutors and to the Grand Jury were false or misleading. He responded truthfully and accurately to each question posed and demonstrated his desire to provide voluntarily any information sought by the investigators.

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[3] See also United States v. Finucan, 708 F.2d 838 (1st Cir. 1983) ("stuff" is ambiguous); People v. Blumenthal, 55 A.D.2d 13, 389 N.Y.S.2d 579 (1976) ("vouch"); State v. Cousins, 4 Ariz. App. 318, 420 P.2d 185 (1966) ("run"); and United States v. Razzaia, 370 F.Supp. 577 (D. Conn. 1973) ("notebook"); United States v. Chapin, 515 F.2d 1274, 1280 (D.C. Cir.), cert. denied, 423 U.S. 1015 (1975); United States v. Bell, 623 F.2d 1132, 1136 (5th Cir. 1980); United States v. Williams, 552 F.2d 226, 229 (8th Cir. 1977); People v. Hoag, 89 Mich. App. 611, 281 N.W. 2d 137, 140-41 (1979); State v. Douglas, 217 Neb. 199, 218, 349 N.W. 2d 870, 882 (1984).

2. Any Inaccuracies Must Be Proved To Have Been Material

The Articles of Impeachment expressly recognize that the House Managers must show not only that Judge Nixon misleadingly concealed information from the prosecutors, but also that that information would somehow have made a difference to the outcome of the investigation. That element logically cannot be established. Judge Nixon did not influence the Drew Fairchild case, nor did he accept any favors from Wiley Fairchild for that, or any other, purpose. When the prosecutors learned the full facts of the phone call they brought no criminal charges based on those events, and no such charges appear in the Articles of Impeachment. No criminal conduct was revealed that was material to the investigation. Judge Nixon's alleged concealment of information thus obstructed no investigation and was not truly material.

3. An Intent To Conceal Information Must Be Proved

Even if the House Managers somehow satisfied the Senate that Judge Nixon made materially false and misleading statements, they still would not have met their burden. They must also show that Judge Nixon made the statements with the intent to conceal information and deceive the prosecutors and the Grand Jury. That burden can only be met by evidence of Judge Nixon's state of mind at the time of the statements -- that is, proof that he was aware that the prosecutors were seeking the information allegedly concealed, and that he intended by his response to conceal the information.[4] The House Managers will wholly fail to establish a wrongful intent on the part of Judge Nixon.[5]

4. The Jury Verdict Is Not Dispositive Of The House's Charges

The House Managers' burden is in no way eased by the jury's verdict. The Constitution vests in the Senate the "sole Power to try all Impeachments," and thereby entitles Judge Nixon an independent review of the facts by the Senate, free of preconceived notions based on the jury verdict. As Alexander Hamilton explained in The Federalist No. 65, this impeachment provision contemplates an impeachment proceeding following on the heels of a judicial trial, and it designates the Senate as the forum for the impeachment trial, to ensure an independent determination of guilt or innocence:

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[4] The statute penalizing false statements before a grand jury expressly requires that the statement have been made "knowingly," 18 U.S.C. § 1623, as does the statute applicable to false statements to a federal investigator, see 18 U.S.C. § 1001, and all other similar statutes, see 18 U.S.C. § 1002-1031. Intent is thus a core element of such offenses. See, e.g., United States v. Lange, 528 F.2d 1280 (5th Cir. 1976) ("A violation of § 1001 requires proof that the defendant had the specific intent to make a false or fraudulent statement" (citations omitted)); United States v. Dudley, 581 F.2d 1193 (5th Cir. 1978) (lying to a grand jury is a "specific intent" crime and standard of intent required under the federal perjury statute, 18 U.S.C. § 1623(a), is same as under § 1001); United States v. Lentz, 524 F.2d 69 (5th Cir. 1975).

[5] Indeed, as the Fifth Circuit has observed, "Numerous cases have found that essentially negative answers to questions propounded by investigating officers are not statements within the meaning of §1001 in the absence of some affirmative, aggressive, or overt falsehood on the defendant's part." United States v. Beer, 518 F.2d 168 (5th Cir. 1975) (collecting cases). The Court, noting that criminal statutes should be strictly construed, reversed the conviction under §1001 of a bank president who inaccurately answered "none" to a request by the FDIC for a list of certain types of loans.

> Would there not be the greatest reason to apprehend that error, in the first sentence, would be the parent of error in the second sentence? That the strong bias of one decision would be apt to overrule the influence of any new lights which might be brought to vary the complexion of another decision? Those who know anything of human nature will not hesitate to answer these questions in the affirmative; and will be at no loss to perceive that by making the same persons judges in both cases, those who might happen to be the objects of prosecution would, in a great measure, be deprived of the double security intended them by a double trial.

For the Senate to defer in any fashion to the jury's verdict would be an abdication of its unique responsibility for impeachments. As Senator Hatch stated in the Claiborne impeachment proceedings: "The separation of criminal and impeachment proceedings, in my mind, precludes this body from merely deferring to the existence of a criminal conviction. We have the duty to reach our own independent conclusion about the facts which gave rise to these charges." 132 Cong. Rec. S15763 (Oct. 9, 1986). Senator Specter echoed these remarks: "[T]he Senate has a duty to make an independent determination of the underlying facts." Id. at S15767.[6] In the Hastings impeachment, the House Managers themselves succinctly stated this principle:

> As the House has repeatedly stressed, impeachment proceedings are separate and independent from the judicial process. The verdict of a criminal jury is not determinative, for otherwise it would undermine the sole power of the Senate to try all impeachments. In analogous situations, the Senate has recognized this principle and refused to defer to a decision of the courts. Accordingly, the issue of what evidence was presented to the jury is wholly irrelevant.[7]

The Framers' wisdom in wholly separating the impeachment trial from any prior judicial trial is nowhere more apparent than in a case such as this, where the judicial trial is plainly unreliable for a number of reasons. Wiley Fairchild, a central witness, has recanted his trial testimony on the most hotly disputed fact, namely whether the telephone conversation between the two men occurred before or after the Drew Fairchild case was "passed to the files." Moreover, as the Senate will hear for itself, witnesses have been identified since the trial who corroborate Judge Nixon's recollection of key facts -- i.e., the timing of the call to Wiley (after the case was passed to the files), who placed the call (Holmes), and whether Nixon had any real discussion with either Holmes or Wiley regarding the Drew Fairchild case (no). Finally, we have developed extensive evidence that was unconstitutionally withheld by the prosecution prior to trial, evidence that would have exonerated Judge Nixon and undercut his prosecutors.

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[6] Thus, the Senate voted to acquit Judge Claiborne under an impeachment article whose sole basis was the prior conviction. See 132 Cong. Rec. S16241 (Oct. 14, 1986) (statement of Sen. McConnell) (impeachment under such an article "would connote an improper reliance by the Senate on the judicial system when it determines impeachable offenses. The Constitution grants the Senate sole power to try impeachment cases."); id. at S15874 (statement of Sen. Matsunaga) (the article "violates our basic tenet, our basic concept of three separate and independent branches of Government").

[7] Amended Final Pretrial Statement of the House of Representatives, In re Impeachment of Judge Alcee L. Hastings 14-15 (filed June 23, 1989) (footnote omitted).

III.

THE ARTICLES OF IMPEACHMENT

The Impeachment Articles do not allege that Judge Nixon did anything wrong in purchasing the oil properties from Wiley Fairchild. Nor is he accused of having done anything wrong in connection with Drew Fairchild's case. The charges are that in his grand jury testimony, and during the April interview, Judge Nixon intentionally concealed his exchanges with Wiley Fairchild and Bud Holmes on that day in March 1983.

We think it helpful to review each of the Articles of Impeachment and highlight the questions that must be answered about Judge Nixon's statements: (i) Were they accurate? (ii) Even if they were not perfectly accurate, can you conclude that he intentionally concealed information from the investigation? The evidence will show that his statements were accurate and reasonable, and that there is no basis for believing that he intended to deceive the investigators.

A. Article I: Did Bud Holmes Discuss The Drew Fairchild Case With You?

Article I focuses on a single exchange between the prosecutor and Judge Nixon, after Judge Nixon had told the grand jury that he knew Bud Holmes well:

> Q. Did he [Bud Holmes] ever discuss the Drew Fairchild case with you?
>
> A. No, not to the best of my recollection. I think I would recall if he had.

The Article charges that this was a materially false and misleading statement, presumably because Judge Nixon did not voluntarily describe Holmes' response when Judge Nixon had related Wiley's blackmail complaint. But in the context of the investigation and of the questioning by the prosecutor, Judge Nixon's answer was completely accurate. Moreover, there is no basis for concluding that he was attempting to deceive the grand jury.

1. Judge Nixon's Testimony Was Accurate

Judge Nixon was justified in denying that Bud Holmes had discussed the Drew Fairchild case with him.

First, his exchange with Holmes concerned Wiley's blackmail complaint. There has been a dispute over whether Judge Nixon simply told Holmes about Wiley's blackmail complaint (as Judge Nixon remembers), or whether (as Holmes has claimed) Judge Nixon told him that Wiley had asked the judge to put in a good word for Drew. Judge Nixon's recollection is much more consistent with other record evidence.

Both Wiley and Judge Nixon agree that when the judge visited Wiley's office in the afternoon, Wiley complained that Holmes was blackmailing him by publicizing Drew's case and dragging the Fairchild name through the media. Neither Wiley nor Judge Nixon recalls any request that the judge put in a good word for Drew. Since Wiley only complained that he was being blackmailed, and did not ask the judge to put in a good word for Drew, there was no reason for Judge Nixon to give Holmes the message that Holmes has described. It only makes sense that Judge Nixon conveyed the complaint he heard, about Holmes' possible blackmail.

Wiley's blackmail complaint did have a connection to Drew's case, but blackmail clearly was a different subject from the case itself. To prove Article I, the House Managers must persuade you that Judge Nixon's testimony was false, that Holmes discussed Drew's case -- and not the blackmailing allegation -- with Judge Nixon. The evidence will not support the House Managers' charge.

Second, both Holmes and Judge Nixon agree that when Holmes offered to tell Judge Nixon about Drew's case, the judge said he did not want to hear about it. Thus, not only was the exchange between Judge Nixon and Holmes on a subject different from Drew's case, but when Holmes attempted to tell Judge Nixon about the case, the judge stopped him from doing so. Article I thus accuses Judge Nixon of falsely denying that Holmes discussed the case when he actually prevented Holmes from starting that discussion. Such an accusation stands common sense on its head.

2. There Is No Evidence Of An Intent To Deceive

As we have explained, witnesses often inadvertently give inaccurate testimony. If the Senate even entertains the possibility that Judge Nixon's testimony was not accurate, there is no basis for concluding that it was intentionally inaccurate.

The Senate must appreciate the context of the prosecutor's questioning and Judge Nixon's answers. The thrust of the investigation was whether Judge Nixon had been bribed to steer Drew's case from federal authorities to state prosecutor Holmes. During the April interview by federal investigators, the investigators told Judge Nixon that the steering issue was central to the investigation. Judge Nixon understood that the only potential criminal liability he faced would be for intervening with the federal handling of Drew's case. In addition, both the investigators and the surrounding publicity made it clear that Judge Nixon was accused of receiving the oil properties from Wiley in return for "fixing" Drew's case. Judge Nixon knew that none of those accusations was true, and was enraged by them.

Thus, when the prosecutor asked if Holmes had discussed the case with Judge Nixon, the judge naturally would have thought of the steering allegation, which had never been mentioned between him and Holmes. The judge also would have thought of the accusation that the oil properties had been sold to him so he could fix Drew's case, and he knew that was not true. In that context, Judge Nixon reasonably did not think of the exchange with Holmes over Wiley's blackmail complaint. In that context, there is no reason to conclude that his answer was designed to deceive or mislead.

This conclusion is powerfully reinforced by the blunt fact that at least three other people knew of Judge Nixon's exchange with Bud Holmes on that night in March 1983. Holmes and Wiley knew about the conversation, and Judge Nixon knew that he also had mentioned it to Carroll Ingram. Nixon had no way of knowing whether any of those people had told others. With the facts so widely known, Judge Nixon could have had no reasonable expectation that the entirely legal events of that evening would remain a secret. Why would a sitting federal judge -- who had committed no crime -- elect to give false testimony about a perfectly proper event when at least three other people knew about it? Why would a federal judge risk his career and his honor and his liberty by intentionally lying about purely legal conduct in those circumstances? He would not and did not.

B. Impeachment Article II

Article II takes out of context certain statements that Judge Nixon made at the end of his grand jury testimony, when the prosecutor asked him if he had anything to add. Judge Nixon, who was deeply angry over the false accusations that had been broadcast in the media, made a speech. In the course of that speech he made the following statements, which the Impeachment Article unfairly chops up into bits:

> And I want to say this. That I've been told and led to believe and read in the newspaper and heard on the news media so much about this is an investigation of the Drew Fairchild criminal case. Now, I have had nothing whatsoever officially or unofficially to do with the Drew Fairchild criminal case in federal court or state court. I don't need to reconstruct anything with reference to that. I've told you that from the beginning.
>
> I have never talked to anyone about the case, any federal judge or state judge, federal prosecutor or state prosecutor, and I never handled any aspect of this case in federal court. As you said, Judge Cox handled it. I don't know where -- someone told me maybe Judge Russell handled one of the other defendants also and -- but I never

> handled any part of it, never had a thing to do with it at all, and never talked to anyone, state or federal, prosecutor or judge, in any way [to] influence anybody with respect to this case.

For many of the reasons that apply to Impeachment Article I, this testimony is entirely accurate, and there is surely no basis for concluding that Judge Nixon was intentionally attempting to conceal facts from the grand jury.

1. The Testimony Was Accurate

As described above, Judge Nixon's only conversations having any connection to the Drew Fairchild case concerned Wiley Fairchild's blackmail complaint. See pp. 3-4, supra. The facts of those conversations are simple:

-- Wiley made the blackmail complaint to him;

-- Judge Nixon passed the blackmail complaint on to Holmes;

-- Holmes said that Wiley was crazy and offered to tell Judge Nixon about the plea bargain in Drew's case, but the judge stopped him from doing so;

-- Holmes called Wiley on the telephone and had a conversation that Judge Nixon did not hear;

-- When Judge Nixon got on the telephone, Wiley said he was satisfied, which Judge Nixon concluded meant that the blackmail issue was resolved;

-- Based on the telephone conversation, Wiley also believed that the blackmail issue had been resolved.

Based on these facts, Judge Nixon truthfully stated that he had had nothing to do with Drew's case. These exchanges did not concern the disposition of Drew's case, and the evidence will show that they had no effect on that disposition.

Similarly, when Judge Nixon stated that he had not "handled any part of it [Drew's case]," he clearly was stating that he had not been the presiding judge for any proceedings involving Drew Fairchild. Article II attempts to obscure that point by chopping up his actual testimony, but the judge stated that Judge Harold Cox handled part of the case (involving Drew's co-conspirators), or perhaps Judge Dan Russell had, but Judge Nixon had never handled any part of it. That statement is absolutely true.

Finally, Judge Nixon assured the grand jury that he had never spoken to anyone to influence the case, which was entirely true. He had repeated a complaint by Wiley Fairchild to an old friend, Bud Holmes. Wiley did not ask him to influence the outcome of the case. Holmes will tell you that Judge Nixon did not attempt to influence him, and made that crystal clear in their exchange. The plain fact is that Judge Nixon did not influence Drew's case, since no action was taken or not taken in Drew's case because of the exchange between Holmes and Judge Nixon. There is no basis for concluding that Nixon's testimony was not true.

2. No Evidence Of Intent To Deceive

We would repeat here our earlier explanation that there is no basis for inferring that Judge Nixon intended to deceive the grand jury with this testimony. In the context of the serious accusations against Judge Nixon in July 1984, he truthfully protested his innocence without any thought of the relatively insignificant exchanges over Wiley's blackmail complaint. And he had no reason to think that -- even had he wished to conceal those innocent conversations -- they would remain concealed if only he lied to the grand jury. Too many people knew about the conversations, and the conversations themselves were too innocuous, for any reasonable person to lie about them.

But there is even less reason to suspect Judge Nixon of an intent to deceive in connection with Article II. In this final speech to the grand jury he was not evading a question, or trying to sidestep an uncomfortable matter. He was speaking out in anger, from his heart, protesting his innocence of wrongdoing. After the last five years, those protestations of innocence have been richly confirmed -- he has not been convicted of any substantive wrongdoing, and does not stand before the Senate charged with any substantive wrongdoing. Even if the Senate concludes that the final speech was overstated and overheated, it must recognize that Judge Nixon's intent was to make clear that he had not intervened in Drew Fairchild's case because of the oil properties he bought from Wiley Fairchild, and that he had no significant involvement in Drew's case. Judge Nixon had no intent to mislead the grand jury in making those statements.

C. Impeachment Article III

Impeachment Article III, as clarified by the Impeachment Trial Committee's First Order (pp. 3-5), charges that Judge Nixon made seven materially false or misleading statements during his interview with the investigators and seven such statements before the grand jury. Each grouping of seven statements basically duplicates the substance of Articles I and II. Article III apparently was included because its duplicative quality provides a grab-bag of charges that will be difficult and confusing for Judge Nixon to defend.

Since Article III alleges 14 false or misleading statements in a single Article, rather than in 14 separate articles, the Senate must find all 14 statements to have been false or misleading in order to convict. Otherwise, each Senator could base a conviction upon a different alleged false or misleading statement, a result that would destroy the constitutional requirement of a two-thirds vote in impeachments.

Since the House Managers have been permitted to proceed on the duplicative and unfair charges in Article III, we address each of the 14 allegedly false or misleading statements in turn. [8] We note at the outset that, since Article III duplicates the substantive allegations of

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[8] See also Judge Nixon's Motion to Dismiss Impeachment Article III. Judge Nixon does not waive any of his objections to Article III, which, the Committee has held, may be presented to the full Senate at the close of the Committee's proceedings.

Articles I and II, the House Mangers' inability to prove that Judge Nixon intentionally made false statements will also apply to Article III. See pp. 23-24, 27-28, supra.

1. Statements Made During the April Interview

a. Judge Nixon never discussed with Wiley Fairchild anything about Wiley's son's case. This statement was, is, and always will be true. What Judge Nixon talked about with Wiley, both in his office and later over the telephone from Holmes' farm, was Wiley's startling assertion that Bud Holmes and others were blackmailing him. Wiley has testified that he never discussed the case itself with Judge Nixon. Although the distinction we draw may initially seem scholastic, it is essential to bear in mind the framework of the interview of Judge Nixon. The investigators told him that their inquiries related to his purchase of oil properties from Wiley and any possible connection between that purchase and Drew's case. Judge Nixon also was assured that there was no evidence of wrongdoing by him. He can hardly be blamed for not thinking of a non-event that to him -- and to any objective mind -- would seem an irrelevant and potentially slanderous tangent having no bearing on the issues of apparent concern to the investigators.

b. Wiley Fairchild never brought up his son's case. For the same reasons set forth in the preceding paragraph, this statement was true.

c. At the time of the interview Judge Nixon had no knowledge of the Drew Fairchild case and did not even know Drew Fairchild existed, except for what the judge previously read in the newspaper and what he learned from the questioners in the interview. The compound nature of this allegation exacerbates the confusing and overlapping qualities of Article III. In any event, taking into account the remarks regarding allegation (a) above, the statement was true, as the evidence will show.

d. Nothing was done or nothing was ever mentioned about Wiley Fairchild's son. Wrenched entirely out of context, this statement is wholly nonsensical. In context, Judge Nixon denied the baseless allegations of bribery in connection with Drew's case that the investigators were seeking, as they put it, to "put to rest." Before Judge Nixon's statement, the prosecutor had asked about the date of his purchase in oil properties, and whether there had been anything asked of him in connection with that purchase. The prosecutor told Judge Nixon that he was a "savvy guy" and knew that judges can be "victimized by others."

Judge Nixon responded, "Well, I don't know about that part of it, but all I know is ah nothing was done or nothing was ever mentioned about WILEY FAIRCHILD's son, and I defy anybody to . . . show any connection or anything I've ever done in connection with WILEY FAIRCHILD's son's case I certainly would (unintelligible) to begin with. And if I even suspected something like that was going on, I certainly wouldn't have ah invested or have any dealings, absolutely." Judge Nixon clearly was stating that his purchase of oil properties had no connection to Drew's case, which indisputably was true. In any event, Judge Nixon was certainly truthful in stating that he had done nothing about Drew; his exchanges with Wiley and Holmes related not to Drew, but to Wiley's claim of blackmail.

e. Judge Nixon had never heard about the Drew Fairchild case, except what he told the questioners in the interview, and certainly had nothing to do with the case. Again, this duplicates the prior allegations, and for the reasons set forth above, was true as stated.

f. Judge Nixon had done nothing to influence the Drew Fairchild case. This statement was true. See pp. 25-28, supra. No action was taken as a result of the judge's exchange with Holmes, and none was sought.

g. State prosecutor Paul Holmes never talked to Judge Nixon about the Drew Fairchild case. This statement was true -- indeed, even understated. After Judge Nixon mentioned in passing Wiley's claim of blackmail, Holmes attempted to discuss Drew's case. Judge Nixon cut off any discussion. See pp. 21-24, supra.

2. Statements Made Before the Grand Jury.

a. Paul Holmes never discussed the Drew Fairchild case with Judge Nixon. See 1(g) above, and pp. 21-24, supra.

b. To the best of his knowledge and recollection, Judge Nixon did not know of any reason he would have met with Wiley Fairchild after the Nixon-Fairchild oil and gas investment was finalized in February 1981. This charge omits a crucial qualification from its paraphrase of Judge Nixon's remarks. What Judge Nixon actually said was:

> I don't know of any reason I would have met with him after the transaction was finalized in the first part of 1981, but I can't say for sure. It's possible. You're asking me about -- I -- I don't like to keep repeating it -- but three or four years ago, and I'm trying to reconstruct this to the best of my recollection and knowledge.

Grand Jury Transcript 56. Judge Nixon was thus anything but assured in his testimony on this issue. Moreover, the questioning preceding these remarks related to meetings between Judge Nixon and Wiley concerning the judge's purchase of oil interests, and the prosecutor's express purpose in this line of questions was to probe any connection between that transaction and the Drew Fairchild case. Judge Nixon knew there was no such connection and accurately and cautiously stated he was not sure of any other "reason" he might have met with Wiley thereafter.

c. Judge Nixon gave the grand jury all the information that he had and that he could, and had withheld nothing during his grand jury testimony. In headlong pursuit of a conviction, the charge once again critically transforms Judge Nixon's actual testimony, which was:

> I came here voluntarily and am very happy to cooperate with this grand jury and give them all the information that I have and that I could. . . . I have nothing at all to -- had nothing to hide or nothing to withhold and I brought everything that you have asked me to bring.

Grand Jury Transcript at 75-76. Contrary to the House's allegation, Judge Nixon did not say that he had given the grand jury all the information he had, but rather stated his willingness to do so. Judge Nixon said that he was happy to cooperate and to give the grand jury all the information he could. To convict on this charge, the Senate would have to conclude that he was not happy to give the grand jury all the information he could even though he volunteered to be the first witness before the grand jury. Such a conclusion would contradict the plain facts. In any event, even if Judge Nixon actually had made the statement attributed to him by the House Managers, that statement would have been entirely truthful in view of the judge's reasonable belief that he had responded to the apparent thrust of the prosecutor's questioning.

d. Judge Nixon had nothing whatsoever unofficially to do with the Drew Fairchild criminal case in State court. See 1.(f) above and pp. 25-28.

e. Judge Nixon never talked to anyone, including the State prosecutor, about the Drew Fairchild case. For the reasons set forth at 1.(a)-(e), and 1.(g), and at pp. 25-28 above, this statement was true.

f. Judge Nixon never had a thing to do with the Drew Fairchild case at all. Again, true. See 1(f) and pp. 25-28, supra.

g. Judge Nixon "never talked to anyone, State or Federal, prosecutor or judge, in any way influence anybody" with respect to the Drew Fairchild case. This statement is completely duplicative of previous statements, and for the reasons spelled out in the preceding discussion, was true.

Respectfully submitted,

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Date: July 31, 1989

IN THE SENATE OF THE UNITED STATES
Sitting As A Court Of Impeachment

In re	)
IMPEACHMENT OF	)
WALTER L. NIXON, JR.	)

JUDGE NIXON'S POTENTIAL WITNESS LIST AND DESIGNATION OF RECORD EVIDENCE

The following list of potential witnesses has been prepared to provide notice to the Senate and to the House Managers of those individuals who might be called as witnesses on behalf of Judge Nixon. We will not necessarily call each of these individuals as witnesses, and we may not be able to decide whether to call each witness until we have seen the case that is presented by the House Managers. By the same token, we may yet determine that other individuals should be called as witnesses, and thus reserve the right to designate such additional witnesses when they come to our attention. The following individuals, however, are the only witnesses that we currently believe are potential witnesses on behalf of respondent in the Senate trial. [1] We have provided estimates of likely time for direct testimony, but

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[1] We have not identified any witnesses relating to the Boam and Seymour civil cases, which are never mentioned in the Articles of Impeachment and are absolutely irrelevant to this proceeding.

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caution that those estimates may well prove inaccurate. As respondent in this proceeding, we are unable to indicate the likely order in which witnesses will be called; that determination depends on the progress of the trial.

A. Potential Witnesses

John Baltar -- Mr. Baltar formerly served as administrative assistant to Wiley Fairchild and was deeply involved in Mr. Fairchild's relationship with Judge Nixon's prosecutors. He can testify concerning promises that the prosecutors made to Mr. Fairchild to induce his cooperation, and about how Mr. Fairchild changed his testimony to adopt the facts proposed by the prosecutor (one hour). Address is 500 Graymont, Suite B, Jackson, MS 39202.

Tom Brennan -- A reporter, now with a Florida newspaper, Mr. Brennan can testify about statements outside the courtroom by the lead prosecutor at Judge Nixon's trial (10 minutes, or by stipulation). Address is c/o Tampa Tribune, P.O. Box 191, Tampa, FL 33601.

Maurice Dantin -- Mr. Dantin served as counsel for Paul "Bud" Holmes, and can testify concerning pressures exerted on Mr. Holmes by federal prosecutors and deals offered by those prosecutors (10 minutes). Address is Dantin & Dantin, Suite 301, Citizens Bank Building, P.O. Box 604, Columbia, MS 39429.

Drew Fairchild -- Mr. Fairchild, the son of Wiley Fairchild, can testify concerning developments in his own criminal prosecution and actions by both prosecutor Paul "Bud" Holmes and his own counsel, William Porter (45 minutes). Address is 1215 Windsor Drive, Hattiesburg, MS 39401.

Rodney Fairchild -- The brother and business partner of Wiley Fairchild, Mr. Fairchild can testify concerning the meeting between Judge Nixon and Wiley Fairchild that preceded the telephone call to Wiley Fairchild's home that was placed from Bud Holmes' farm (10 minutes). Address is c/o W.R. Fairchild Construction Co., Ltd., P.O. Box 1857, Hattiesburg, MS 39401.

Wiley Fairchild -- Mr. Fairchild operates a successful construction business and an oil and gas development company. He can testify concerning his conversation with Judge Nixon relating his suspicions that Bud Holmes was blackmailing him, and the subsequent telephone call he received from Bud Holmes' farm. Mr. Fairchild can also testify concerning the promises made to him by federal prosecutors and the pressures placed on him during the investigation to come up with a "smoking gun" against Judge Nixon (one hour). Address is c/o

W.R. Fairchild Construction Co., Ltd., P.O. Box 1857, Hattiesburg, MS 39401.

James Halsted -- A professor at the University of South Florida, Mr. Halsted can confirm the authenticity of two tape recordings of telephone interviews he conducted with Bud Holmes about the Nixon case after the trial was over. (10 minutes, or by stipulation.) Address is Department of Criminology, University of South Florida, Tampa, FL 33620.

Geoffrey C. Hazard, Jr. -- Sterling Professor of Law at Yale Law School and the Director of the American Law Institute, Prof. Hazard is the leading expert on legal and judicial ethics in this country. He can testify concerning the propriety of Judge Nixon's conversations with Wiley Fairchild and Paul "Bud" Holmes that are at issue in this case (45 minutes). Address is c/o Yale Law School, 401A Yale Station, New Haven, CT 06520-7397.

Barry Hess -- Having served as counsel to both Wiley Fairchild and Drew Fairchild, Mr. Hess might testify concerning the promises made to both men by the federal prosecutors and the elements of his clients' plea bargains. (By transcript from the post-conviction hearing.) Address is Hess, Atchison & Horne, 301 St. Joseph Street, P.O. Box 1706, Mobile, AL 36633.

Boyce Holleman -- Counsel to Judge Nixon, Mr. Holleman can testify concerning the circumstances of Wiley Fairchild's recantation of his trial testimony (10 minutes, or by stipulation). Address is P.O. Drawer 1030, 1913 15th Street, Gulfport, MS 39502.

Michael B. Holleman -- Counsel to Judge Nixon, Mr. Holleman can testify concerning the discovery in the records of Fairchild Construction Co. of notes and outlines of testimony which later proved to be in the handwriting of Reid Weingarten, the lead prosecutor (10 minutes, or by stipulation). Address is P.O. Drawer 1030, 1913 15th Street, Gulfport, MS 39502.

Paul "Bud" Holmes -- Former State's Attorney for Forrest County, Mississippi, Mr. Holmes can testify that (i) Judge Nixon stopped him from discussing the Drew Fairchild case with the judge, (ii) Judge Nixon did not attempt to influence his handling of the Drew Fairchild prosecution, and (iii) about the Drew Fairchild case (one hour). Address is 179 Indian Mound Lane, Slidell, LA 70461.

Carroll Ingram -- If the Committee allows testimony concerning Judge Nixon's purchase of oil properties from Wiley Fairchild -- which has no direct relevance to the

Articles of Impeachment, Mr. Ingram can testify concerning the complete propriety of the transaction, for which he handled the legal documentation. Mr. Ingram also can testify about Bud Holmes' attempts to persuade him to change his testimony, and concerning Holmes' statements about the events surrounding the phone call from the farm. (90 minutes.) Address is 307 West Pine, Hattiesburg, MS 39401.

Karl Kepper -- Having served as counsel to both Wiley Fairchild and Drew Fairchild, Mr. Kepper might testify concerning Wiley Fairchild's initial recollection of the telephone call from Bud Holmes' farm, before that recollection was altered in response to pressure from the federal prosecutors (15 minutes). Address is 327 North 25th Avenue, Hattiesburg, MS 39401.

David Massey -- An attorney and oil investor in Mississippi, Mr. Massey has reviewed the three oil interests purchased by Judge Nixon from Wiley Fairchild. Mr. Massey concluded that at the time that the sale was agreed to in early 1980, the sale price of the properties of $9,500 represented fair market value. (By designation of trial transcript, pp. 1378-1407).

Katie Matison -- Former Assistant State's Attorney working for Paul "Bud" Holmes, Ms. Matison was assigned to handle the Drew Fairchild prosecution. Ms. Matison can testify concerning Mr. Holmes' efforts to intimidate her into concealing the true facts of the Drew Fairchild case (20 minutes). Address is P.O. Box 284, Hattiesburg, MS 39401.

Richard McKenzie -- Judge of the Forrest County Circuit Court, Judge McKenzie can testify concerning the Drew Fairchild case which was before him (20 minutes). Address is 316 Forrest Street, Hattiesburg, MS 39401.

Walter L. Nixon, Jr. (Two and one-half hours).

George Phillips -- United States Attorney for the Southern District of Mississippi, Mr. Phillips can testify concerning his office's failure to prosecute the Drew Fairchild case and the transfer of the case to state jurisdiction at Bud Holmes' request (20 minutes). Address is U.S. Attorney, SDM, P.O. Box 2091, Jackson, MS 39205.

Robert Royals -- A former business associate of both Wiley Fairchild and Drew Fairchild, Mr. Royals was convicted of drug smuggling charges similar to those brought against Drew Fairchild. Mr. Royals had served as a pilot for Paul "Bud" Holmes and was a close friend of William Porter, who was counsel to Drew Fairchild. Mr. Royals can testify about Mr. Porter's statements concerning the Drew Fairchild case and about his own conversations with Wiley Fairchild about the case (30 minutes). Address is 3009 Navajo Circle, Hattiesburg, MS 39402.

Counsel for Judge Nixon has spoken to Mr. Royals about testifying at this trial, and Mr. Royals stated that he would not testify without a grant of immunity. Counsel for Judge Nixon thereafter spoke with Mr. Royals' lawyer, Rex Jones of Hattiesburg, who confirmed that Mr. Royals will assert his Fifth Amendment privilege against testifying unless he is granted testimonial immunity.

Fred Strasser -- A reporter, Mr. Strasser can testify concerning statements made by the lead prosecutor outside the courtroom during Judge Nixon's trial (10 minutes, or by stipulation). Address is c/o National Law Journal, National Press Building, Suite 1183, Washington, D.C. 20045.

Betty Lou Watkins -- Ms. Watkins has been Judge Nixon's secretary since 1982. She can identify office records reflecting a telephone call from Bud Holmes to Judge Nixon on March 11, 1983, and can also testify concerning her review of press coverage of the Drew Fairchild case from 1980 to 1983 (10 minutes, or by stipulation). Address is: c/o Judge Walter L. Nixon's Chambers, P.O. Box 1900, Biloxi, MS 39533.

Reid Weingarten -- The lead prosecutor, Mr. Weingarten can testify concerning promises that he made to induce Wiley Fairchild and Bud Holmes to testify against Judge Nixon (30 minutes). Address is c/o Steptoe & Johnson, 1330 Connecticut Avenue, N.W., Washington, D.C. 20036.

Jack Weldy -- Formerly judge of the Forrest County Circuit Court, Judge Weldy can testify concerning his handling of the Drew Fairchild case and concerning his experience with the prosecutorial practices of Paul "Bud" Holmes (15 minutes). Address is 605 South 34th Avenue, Hattiesburg, MS 39401.

Glenn White -- Mr. Holmes' former assistant and now his successor as State's Attorney for Forrest County, Mr. White can testify concerning the handling of the Drew Fairchild criminal case (20 minutes). Address is State's Attorney, P.O. Box 866, Hattiesburg, MS 39401.

Character Witnesses -- We may decide to call several character witnesses. Such testimony ordinarily is brief, and we would not expect to call more than ten such witnesses. When we have identified those witnesses, we will provide prompt notice to the Senate and the House Managers (90 minutes, maximum).

B. Designation of Record Evidence

THE DREW FAIRCHILD CASE

1. Bill Porter of Hattiesburg, who represented Drew Fairchild in his criminal case, complained to Bud Holmes in the summer of 1981 that Drew had not paid his fee in full. To help Porter collect his fee, Holmes called U.S. Attorney George Phillips, who also is from Hattiesburg and asked him if he could take over Drew's prosecution. When Phillips agreed, Holmes indicted Drew in state court, and his primary motive for doing so was to help Porter collect his fee.

Trial Tr. 732-34, 843-46, 936 (Holmes)
House Tr. 11-13 (Holmes) (7/8/88)

2. In December 1982, Bill Porter again complained to Bud Holmes about the Drew Fairchild case, this time complaining that Circuit Judge Jack Weldy was leaving office and would be replaced by Richard McKenzie, a political adversary of Porter's. In response to Porter's complaints, Holmes decided to pass Drew's case to the files.

Trial Tr. 754-55, 858-59 (Holmes)
House Ex. N-49
House Ex. N-48

3. Passing Drew's case to the files was a legally meaningless act, which was reversed 33 days later when the case was restored to the active docket.

Trial Tr. 755, 924 (Holmes)
Trial Tr. 1853 (Reid Weingarten)

THE PHONE CALL FROM BUD HOLMES' FARM

4. After Drew's case was returned from the files, Judge Nixon happened to visit Wiley Fairchild in his office. Wiley complained that Bud Holmes and possibly Carroll Ingram were blackmailing him by dragging the good Fairchild name through the media.

Trial Tr. 481-84 (Wiley)
Trial Tr. 1532-35 (Nixon)

5. Wiley Fairchild did not ask Nixon to do anything for him.

Trial Tr. 640-41 (Wiley)
House Tr. 5, 44-45 (Wiley) (7/7/88)

6. At Bud Holmes' farm that evening, Holmes offered to tell Nixon about Drew's case, but Nixon stopped him from doing so.

House Tr. 133, 203 (Holmes) (7/7/88)
House Tr. 17 (Holmes) (7/8/88)

7. Holmes then placed a telephone call to Wiley Fairchild and gave Judge Nixon the telephone. Wiley told Nixon that he was glad Nixon had mentioned that matter to Holmes and he was satisfied with the situation.

Trial Tr. 1541-42 (Nixon)

8. Both Wiley and Judge Nixon concluded from the phone call that the blackmailing accusation had been resolved.

Neither recall any statement by Bud Holmes concerning passing Drew's case to the files.

Trial Tr. 663 (Wiley)
House Tr. 12, 47 (Wiley) (7/7/88)

9. Holmes did not think that Judge Nixon had attempted to influence him in connection with Drew Fairchild's case.

House Tr. 130, 213, 240-41 (Holmes) (7/7/88)

10. Neither Holmes nor Wiley Fairchild was sober during the phone call to Wiley from Holmes' farm.

House Tr. 92 (Wiley) (7/6/88)
House Tr. 87 (Holmes) (7/8/88)

11. Although Wiley Fairchild did tell Judge Nixon about his suspicion that Holmes was blackmailing him over Drew's case, Wiley did not consider that he had discussed Drew's case with Judge Nixon.

House Tr. 12 (Wiley) (7/7/88)

12. Although Carroll Ingram learned from Judge Nixon that the judge had conveyed some message from Wiley to Holmes concerning Drew Fairchild's case, Ingram did not consider that he had discussed Drew's case with Judge Nixon; neither did the lead prosecutor.

House Tr. 258-59 (Ingram) (7/8/88)
House Tr. 108-09 (Weingarten) (6/9/88)

THE INVESTIGATION

13. During the April 1984 interview of Judge Nixon, the federal investigator focused his attention on the question how Drew Fairchild's case was transferred from federal to state prosecutors.

Def. Trial Ex. 43A, pp. 28-29, 42-43, 46, 50

14. The publicity and leaks surrounding the Fairchild/Nixon investigation in the summer of 1984 were terrible, and prompted issuance of a gag order against leaks by federal investigators.

House Tr. 81-85, 94 (Judge Nixon) (7/12/88)
House Tr. 43 (Weingarten) (6/10/88)

15. Before they reached plea bargains with the government and changed their recollection, both Wiley and Holmes stated that Holmes placed the call to Wiley from Holmes' farm.

Post-Conviction Ex. 20
Post-Conviction Tr. 50 (Baltar)
House Tr. 257 (Ingram) (7/8/88)

CHANGING THE WITNESSES' TESTIMONY

(a) Wiley Fairchild

16. When Wiley Fairchild began plea negotiations with federal prosecutors in fall 1984, they told him that he had to give them a "smoking gun" on Judge Nixon. Wiley lay awake nights trying to come up with such a smoking gun.

House Tr. 110 (Wiley) (7/6/88)
House Tr. 7, 57 (Wiley) (7/7/88)
Post-Conviction Tr. 30 (Baltar)
Post-Conviction Tr. 193 (Wiley)

17. The lead prosecutor made the following promises to Wiley Fairchild in the course of plea bargaining with him and preparing Wiley to testify.

(a) To do what he could to help Drew in Drew's drug prosecution

Post-Conviction Tr. 202-03 (Wiley)
Post-Conviction Tr. 43-44 (Baltar)
Post-Conviction Tr. 427-28 (Weingarten)

(b) To help Wiley maintain his eligibility for federal contracting.

Post-Conviction Tr. 263-64 (Hess)
Post-Conviction Tr. 400 (Weingarten)

(c) To help drop the charges against Wiley if he became convinced there was no connection between Judge Nixon and Drew's case.

House Tr. 103 (Wiley) (7/6/88)
Post-Conviction Tr. 45-46 (Baltar)
Post-Conviction Tr. 250-51 (Hess)
Post-Conviction Tr. 378 (Weingarten)
Post-Conviction Tr. 203-04 (Wiley)

(d) To assist Wiley's application for an executive pardon.

House Tr. 112 (Wiley) (7/6/88)
House Tr. 117 (Weingarten) (6/9/88)
Post-Conviction Tr. 209-10 (Wiley)
Post-Conviction Tr. 70-72, 105-07 (Baltar)
Post-Conviction Tr. 378-80 (Weingarten)

18. In response to pressure from the prosecutor, Wiley changed his description of the events in this case on the following matters:

(a) The date of the phone call from Bud Holmes' farm, on which Wiley adopted the prosecutor's suggestion that the call occurred before Drew's case was passed to the files.

Post-Conviction Tr. 36-38, 48, 54 (Baltar)
Post-Conviction Tr. 214, 225-26 (Wiley)

(b) The date when Wiley and Carroll Ingram first talked about selling oil properties to Judge Nixon, on which Wiley adopted the prosecutor's suggestion that he conversation occurred after the drug bust at the Hattiesburg Airport in August 1980.

Post-Conviction Tr. 37, 47-48 (Baltar)
Post-Conviction Tr. 212-13, 215-16 (Wiley)

(c) Who placed the call, as Wiley changed his memory from Bud Holmes making the call to Nixon placing the call.

Post-Conviction Tr. 33, 50 (Baltar)
Post-Conviction Ex. 20 (FBI memorandum of interview with Wiley)

19. In early 1985, when the Mississippi state authorities refused to enforce Bud Holmes' plea bargain with Drew, the federal prosecutors intervened at Drew's lawyer's request and indicted Drew on federal charges to preempt the state prosecution and to protect Drew from a long term in state prison.

Post-Conviction Ex. 5

20. In plea bargaining with Drew, the federal prosecutors promised not to recommend any specific prison term at Drew's sentencing, and lived up to that promise at the sentencing.

Post-Conviction Tr. 269-70, 287-88 (Hess)
Post-Conviction Tr. 440 (Weingarten)

21. To make sure that Wiley gave the testimony the prosecutor wanted, the prosecutor encouraged John Baltar to prepare a chronology or "script" for Wiley to study. The prosecutor even gave Baltar a model for such a chronology in

his own handwriting. The prosecutor's original notes were found in the records of Fairchild Construction Co.

Post-Conviction Ex. 23
Post-Conviction Tr. 51-55 (Baltar)
Post-Conviction Tr. 204 (Wiley)
Post-Conviction Tr. 433-36 (Weingarten)

22. Baltar, with assistance from the prosector, prepared the chronology and marked with yellow high-liner and arrows the points the prosecutor wanted covered. A copy of the Weingarten/Baltar script was found in the Justice Department's files.

Post-Conviction Ex. 18
Post-Conviction Tr. 50-55 (Baltar)
Post-Conviction Tr. 433-36 (Weingarten)

23. As late as spring of 1988, wiley was still trying to get the prosecutor to help him get an executive pardon.

Post-Conviction Tr. 102-03 (Baltar)
Post-Conviction 452-53 (Weingarten)

(b) Bud Holmes

24. In February 1985, Judge Nixon's lawyer confirmed to Holmes' attorney that Judge Nixon remembered the phone call from the farm to Wiley.

House Tr. 183 (Holmes) (7/7/88)

25. In early 1985, Bud Holmes personally pressured two witnesses, Carroll Ingram and Kate Matison, to give testimony favorable to him.

Trial Tr. 1091-93 (Ingram)
Trial Tr. 1348-58 (Matison)

26. The federal prosecutor told Holmes in March 1985 he did not have to be indicted if he would fill in the gaps of the investigations, which Holmes understood to mean that he had to come up with incriminating information about Judge Nixon.

House Ex. N-26
House Ex. N-27
House Tr. 237-38 (Holmes)
Trial Tr. 813-17 (Holmes)

27. The lead prosecutor believed, and told Bud Holmes, that the government probably could not convict Holmes on several of the charges in his indictment.

House Ex. N-26, ¶ 7.
House Ex. N-30, ¶ 7.

JUDGE NIXON'S PURCHASE OF OIL PROPERTIES

28. The verbal agreement for Judge Nixon to purchase oil property from Wiley Fairchild was reached in late 1979 or early 1980, about eight months before the drug bust at the Hattiesburg Airport that involved Drew Fairchild.

Trial Tr. 1036-37 (Carroll Ingram)
Post-Conviction Tr. 213 (Wiley Fairchild)

House Tr. 64-65 (Wiley Fairchild) (7/7/88)
House Tr. 104-05 (Ingram) (7/8/88)

29. Judge Nixon intended to make a loan to purchase oil properties from Wiley Fairchild, so when Fairchild offered To loan him the money, Judge Nixon borrowed the money from Fairchild at 10% interest.

Trial Ex. 19
Trial Tr. 1053-59 (Ingram)
House Tr. 137-38, 141 (Ingram) (7/8/88)

30. Two of the three oil properties bought by Judge Nixon from Wiley Fairchild were successful, while the third was entirely unsuccessful.

Trial Ex. D-20, D-21

31. At about the same time he bought the oil interests from Fairchild, Judge Nixon made other oil and gas investments which he also financed through loans.

House Tr. 28-31 (Judge Nixon) (7/12/88)
House Ex. N-20.

32. Wiley Fairchild set the price and terms for the oil interests he sold to Judge Nixon, and Wiley made profits ranging from 1,300% to 8,000% on the royalty interests he sold to Judge Nixon.

House Ex. N-14
House Tr. 25-26 (Wiley) (7/7/88)

33. Judge Nixon recused himself from one case which involved Wiley Fairchild's oil interests, and from another case which involved a different investment by Judge Nixon.

> Trial Tr. 1504-05 (Judge Nixon)
> House Tr. 129-31, 135-37 (3/2/89) (and
> unnumbered exhibit in Transcontinental)

34. Judge Nixon's purchase of oil properties from Wiley Fairchild was reported on his annual financial disclosure form for 1981 and thereafter, and was recorded in the public land records of Alabama and Mississippi.

> Trial Ex. D-40, D-41
> House Tr. 171-72 (Ingram) (7/8/88)

Respectfully submitted,

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Date: July 31, 1989

IN THE SENATE OF THE UNITED STATES
Sitting As A Court Of Impeachment

In re
IMPEACHMENT OF
WALTER L. NIXON, JR.

JUDGE NIXON'S LIST OF POTENTIAL EXHIBITS

The following list of exhibits must be tentative at this time. Before and during trial, we may discover materials that should be added as exhibits, and we may determine that items listed below should not be offered as evidence. The following list is the best list we can assemble now. Although we have numbered the potential exhibits in this submission, we anticipate that we will renumber them after we have an opportunity to coordinate our list of exhibits with the House Managers' exhibits. We intend to consult with the House Managers to determine those exhibits that by agreement can be presented and admitted into the record by one side or the other, and thereby avoid duplication of exhibits. When we have completed that process, we will prepare a more final list of numbered exhibits.

In the following list, we have indicated in parentheses those items for which we have identified a previous designation in another proceeding. "Tr. Ex." means Trial

Exhibit; "House Ex." refers to the hearings before the House Subcommittee; "P.C. Ex." refers to the post-conviction hearing last August.

1. Aug. 4, 1980 -- Hattiesburg American, "Four arrested -- Plane-load of marijuana seized at local airport."

2. Aug. 5, 1980 -- Hattiesburg American, "Bond set for 4 jailed in drug bust"

3. Aug. 5, 1980 -- Jackson Clarion-Ledger, "Agents seize 1,900 pounds of pot."

4. April 16, 1981 -- Summons and Declaration by William F. Porter in Porter v. Drew Fairchild, No. 3-81-567 (Forrest County Cir. Ct.) (House Ex. N-2)

5. July 3, 1981 -- Check from Wiley Fairchild to William F. Porter, $2,669.19 (House Ex. 6; Tr. Ex. D-2)

6. Sept. 3, 1981 -- Check from Wiley Fairchild to William F. Porter, $7,500 (House Ex. 6; Tr. Ex. D-3)

7. July 6, 1981 -- FBI Memorandum of interview with Judge Jack Weldy

8. Aug. 26, 1981 -- Indictment, State v. Reddit Andrew Fairchild and Robert L. Watkins, No. 10,041 (Forrest County Cir. Ct.) (P.C. Ex. P-8(a); House Ex. 7; Tr. Ex. G-3)

9. Aug. 27, 1981 -- Hattiesburg American, "Local man is indicted in 1980 airport pot bust."

10. Aug. 29, 1981 -- Hattiesburg American, "Municipal Airport has been attractive to drug smugglers."

11. Jan. 5, 1982 -- Hattiesburg American, "Drug deal suspect arrested in Texas."

12.	Jan. 12, 1982 --	Entry of Guilty Plea, State v. Reddit Andrew Fairchild, No. 10,041 (Forrest County Cir. Ct.) (House Ex. 8)
13.	March 19, 1982 --	Order, State v. Reddit Andrew Fairchild, (granting Continuance) (House Ex. N-1(A))
14.	June 25, 1982 --	Motion to Defer Sentencing, State v. Reddit Andrew Fairchild (House Ex. N-1(B))
15.	June 25, 1982 --	Judge Nixon's Amended Financial Disclosure Report for 1981 (Tr. Ex. D-40)
16.	July 12, 1982 --	Order, State v. Reddit Andrew Fairchild, (granting continuance) (House Ex. N-1(D))
17.	Oct. 13, 1982 --	Complaint and Docket Sheet, Transcontinental Gas Pipe Line Corp. v. Mississippi State Oil & Gas Board, No. J82-0531(L)
18.	Nov. 2, 1982 --	Hattiesburg American, "Drug smuggling suspect arrested."
19.	Nov. 15, 1982 --	Order, State v. Reddit Andrew Fairchild, (granting continuance) (House Ex. N-1(E))
20.	Dec. 7, 1982 --	Extradition request, re Robert L. Watkins (House Ex. 17)
21.	Dec. 27, 1982 --	Order, State v. Reddit Andrew Fairchild (passing case to the files) (House Ex. 18; Tr. Ex. G-4)
22.	Jan. 7, 1983 --	Hattiesburg American, "Weldy Passes to Inactive File Fairchild Drug Smuggling Charge." (House Ex. 20; Tr. Ex. D-6)
23.	Jan. 26, 1983 --	Motion, State v. Reddit Andrew Fairchild (to return case from files) (House Ex. 19; Tr. Ex. D-7)

24. Jan 26, 1983 -- Order, *State v. Reddit Andrew Fairchild* (returning case to active docket) (House Ex. 19, Tr. Ex. D-7)

25. Jan. 27, 1983 -- *Hattiesburg American*, "Fairchild Case Returns To Active Files." (Tr. Ex. D-8)

26. March 11, 1983 -- Telephone message slip from B.L. Watkins to Judge Nixon

27. Nov. 10, 1983 -- Transcript of "Anonymous" Call to FBI by Robert "Skip" Jarvis (House Ex. N-5; Tr. Ex. D-10)

28. Nov. 17, 1983 -- Transcript of "Anonymous" Call to FBI by Robert "Skip" Jarvis (House Ex. N-6)

29. Jan. 1984 -- FBI Memo re interviews with Lt. Mike Tyson and Capt. James Kelly of the Mississippi Bureau of Narcotics

30. Jan. 24-26, 1984 FBI Memorandum of interviews with Lt. Tyson and Capt. Kelly

31. Feb. 6, 1984 -- Transcript of "Anonymous" Call to FBI by Robert "Skip" Jarvis (House Ex. N-7)

32. April 10, 1984 -- FBI Report of Interview with Wiley Fairchild (House Ex. N-8)

33. April 11, 1984 -- FBI Report of Interview with Wiley Fairchild (House Ex. N-9; Tr. Ex. D-9)

34. April 18, 1984 -- FBI Report of Interview with Wiley Fairchild (House Ex. N-10)

35. April 18, 1984 -- Transcript of Secretly-Recorded Conversation Between Robert "Skip" Jarvis and Wiley Fairchild (House Ex. 21, Tr. Ex. D 16(A); P.C. Ex. P-11)

36.	April 18, 1984 --	Transcript of Secretly-Recorded Telephone Conversation between Robert "Skip" Jarvis and Wiley Fairchild (House Ex. 21, Tr. Ex. D 17(A))
37.	April 19, 1984 --	FBI Report of Interview with Wiley Fairchild (House Ex. N-11)
38.	April 24, 1984 --	FBI Memorandum of interview with Drew Fairchild
39.	May 4, 1984 --	FBI Memorandum of interview with Paul "Bud" Holmes (House Ex. N-48)
40.	July 18, 1984 --	Grand jury testimony of Wiley Fairchild
41.	July 19, 1984 --	Grand jury testimony of Carroll Ingram
42.	July 20, 1984 --	Grand jury transcript for Paul "Bud" Holmes
43.	Sept. 5, 1984 --	Grand Jury transcript for Paul "Bud" Holmes
44.	Sept. 6, 1984 --	News Announcement, U.S. Dept. of Justice (House Ex. N-15)
45.	Sept. 6, 1984 --	Indictment, *United States v. Wiley Fairchild*, No. H84-00009 (S.D. Miss.) (House Ex. 25)
46.	Nov. 1, 1984 --	Transcript of Proffer by Wiley Fairchild to U.S. Government (House Ex. N-16)
47.	Nov. 2, 1984 --	FBI Teletype, Jackson to Washington, D.C. (P.C. Ex. P20)
48.	Nov. 20, 1984 --	Letter from Reid Weingarten to Barry Hess (P.C. Ex. G-B; Tr. Ex. D-28; P.C. Ex. P-2)

49.	Nov. 26, 1984 --	Plea Agreement, *United States v. Wiley Fairchild*, Crim. No. 84-0009 (S.D. Miss.) (House Ex. 28, Tr. Ex. D-29; P.C. Ex. G-C & P-3)
50.	Undated --	Handwritten chronology of events, written out by John Baltar, beginning "August 4th 1980 --Airport Drug Bust." (P.C. Ex. P-18)
51.	Undated --	Handwritten outline of Wiley Fairchild testimony, prepared by Reid Weingarten (P.C. Ex. P-22, P-22(A))
52.	Undated --	Handwritten chronology of events, prepared by Reid Weingarten for Wiley Fairchild (P.C. Ex. P-23)
53.	Undated --	Handwritten notes of telephone conversation between John Baltar and Barry Hess, beginning, "Barry Hess/Dbl & Single." (P.C. Ex. P-17)
54.	Undated --	Handwritten chronology of events prepared by John Baltar, beginning, "1981 -- Call to Audrey." (P.C. Ex. P-19)
55.	Nov. 30, 1984 --	FBI Teletype
56.	Dec. 4, 1984 --	FBI Memorandum of interview with Drew Fairchild
57.	Dec. 12, 1984 --	FBI Memorandum of interview with Drew Fairchild
58.	Feb. 21, 1985 --	Letter from Reid Weingarten to Joel Blass (House Ex. 29)
59.	Feb. 21, 1985 --	Grand jury transcript for Paul "Bud Holmes
60.	March 5, 1985 --	Letter from Reid Weingarten to Glenn White (P.C. Ex. G-F & P-4; House Ex. N-3)

61.	March 7, 1985 --	Motion for Leave to Withdraw Guilty Plea, *State v. Reddit Andrew Fairchild* (P.C. Ex. P-8(c); House Ex. 30)
62.	March 8, 1985 --	Order, *State v. Reddit Andrew Fairchild* (allowing withdrawal of guilty plea) (P.C. Ex. P-8(c); House Ex. 30)
63.	March 22, 1985 --	Memo from Jan Neilson Little and Reid Weingarten to G.E. McDowell re prosecution of Drew Fairchild (P.C. Ex. P-5)
64.	March 29, 1985 --	Indictment, *United States v. Drew Fairchild*, G. No. H85-00005 (P.C. Ex. P-9; Tr. Ex. G-5; House Ex. 32)
65.	March 29, 1985 --	Indictment, *United States v. Paul H. "Bud" Holmes*, Cr. No. H85-00004 (House Ex. 31; Tr. Ex. G-21)
66.	May, 1985 --	Letter from Robert "Skip" Jarvis to FBI Agent Kenneth White-Spunner (House Ex. N-17; Tr. Ex. D-15)
67.	June 18, 1985 --	Plea Agreement, *United States v. Paul H. "Bud" Holmes* (House Ex. 33, Tr. Ex. G 23)
68.	June 24, 1985 --	FBI Memorandum of June 24, 1985 interview with Paul H. "Bud" Holmes
69.	June 28, 1985 --	Grand Jury Transcript for Paul "Bud" Holmes
70.	Oct. 28, 1985 --	Transcript of Secretly-recorded telephone conversation between Holmes and W.P. (Pat) McMullan. (Tr. Ex. D-32)
71.	Dec. __, 1985 --	Sentencing Memorandum, *United States v. Paul H. "Bud" Holmes*
72.	Jan. 7, 1986 --	Letter from Reid Weingarten to Michael Fawer (P.C. Ex. G-G & P-7; House Ex. N-4)

73.	Undated --	Script for Wiley Fairchild Trial Testimony (P.C. Ex. P-1)
74.	Jan. 9, 1986 --	FBI Memorandum of interview with Robert Royals.
75.	Jan. 13, 1986 --	Transcript of Sentencing, United States v. Paul "Bud" Holmes (House Ex. N-19)
76.	Nov. 14, 1986 --	Tape and transcript of telephone conversation between Paul "Bud" Holmes and Jim Halsted
77.	Dec. 22, 1986 --	Tape and transcript of telephone conversation between Paul "Bud" Holmes and James Halsted
78.	March 4, 1987 --	Transcript of testimony of Paul H. "Bud" Holmes, Matison v. White, C.A. No. H86-0155 (W), pp. 15-17 (House Ex. N-49)
79.	Feb. 29, 1988 --	Affidavit of Paul Holmes (House Ex. N-26)
80.	Dec. 19, 1988 --	Statement of Magistrate John Roper (House Ex. 19 (Mar. 2, 1989))
81.	Undated --	Resume of Prof. Geoffrey C. Hazard, Jr. (House Ex. N-47)

Respectfully submitted,

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Date: July 31, 1989

IN THE SENATE OF THE UNITED STATES
Sitting As A Court Of Impeachment

In re IMPEACHMENT OF WALTER L. NIXON, JR.	)))))

ISSUE PROFFER: PROSECUTORIAL MISCONDUCT [1]

After sifting through the mountain of paper generated in this case, the Senate will have to decide what testimony and which witnesses are credible. To reach that decision, the Senate must understand how the various witnesses were pressured and induced by federal prosecutors to come up with something -- anything -- to use against Judge Nixon.

Wiley Fairchild and Paul "Bud" Holmes were critical trial witnesses against Judge Nixon. Both men have changed their recollection in important respects throughout this case. Indeed, on the central disputed facts, both witnesses initially testified consistently with Judge Nixon and changed their recollection on certain central disputed matters after they were indicted and made deals with the government. These changes in the recollection include:

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[1] We make no presentation concerning the Petit Bois Island issue because we do not now intend to present direct evidence on that issue during the hearing.

1. When was phone call to Wiley Fairchild from Bud Holmes' farm?

Witness	Before Deal With Prosecutors	After Deal With Prosecutors
Wiley Fairchild:	After December 1982, when Drew Fairchild's case was passed to the files.	Before December 1982.
Bud Holmes:	1982 or 1983	May 14, 1982

2. Who placed the call from Holmes' farm?

Witness	Before Deal	After Deal
Wiley Fairchild:	Bud Holmes	Judge Nixon
Bud Holmes:	Bud Holmes	Judge Nixon

3. When did Carroll Ingram mention to Wiley Fairchild that Judge Nixon was interested in purchasing oil and gas property?

Witness	Before Deal	After Deal
Wiley Fairchild:	In 1979 or 1980, before the drug bust at Hattiesburg Airport.	In 1981, after the drug bust at Hattiesburg Airport.

4. Why did Bud Holmes pass Drew Fairchild's case to the files in December 1982?

	Before Deal	After Deal
Bud Holmes:	Because Bill Porter asked him to do so.	Because Porter asked him to to do so, and because during the phone call from his farm seven months earlier he told Wiley Fairchild he would do so.

What made these witnesses change their testimony to fit the prosecution's theory? Wiley Fairchild answered that question when he recanted his trial testimony last August, admitting that he had given false testimony at trial in order to please the prosecutors. He said that he gave the false testimony because the prosecutors scared him.

The prosecutors' techniques for manipulating Wiley Fairchild's testimony were revealed at that post-trial hearing last August. Wiley was fed certain facts that the prosecution wanted to establish. The prosecutor urged John Baltar, Wiley Fairchild's assistant, to prepare a script for Wiley to study to learn these new "facts," and the prosecutor even prepared testimonial outlines for Wiley in the prosecutor's own handwriting.

Simultaneously, the prosecutor led Wiley on with clever promises. He promised Wiley that he would do what he could to help his son, Drew, which always was Wiley's most vulnerable point. The prosecutor also promised to help Wiley in contracting problems with the federal government and led Wiley to believe that he would help Wiley get an executive pardon. The prosecutor and even suggested that in some circumstances the charges against Wiley might still be dropped. By feeding certain facts to Wiley and holding out possible rewards for "good" testimony, the prosecutor induced Wiley to give false testimony at trial.

With Bud Holmes, the prosecution had (to use the prosecutor's word) a more "savvy" witness. Holmes did not need scripts or a lot of leading by the prosecutors. The prosecutor simply made it clear to Holmes that the only way to solve his problems was to help the government nail Judge Nixon; Holmes could figure out the rest for himself.

The following witnesses can describe for the Senate the government's manipulation of the facts in this case, and how the witnesses were induced to change their testimony, as we have described above and in our separate list of witnesses. [2]

Wiley Fairchild -- Will describe intimidation by federal investigators, use of scripts and drilling to mold his testimony so as to include false statements, and various promises made by the government to ensure his cooperation.

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[2] We note that we may not actually call any of the specified witnesses at trial, depending on developments at the trial, and that we may identify additional witnesses on these matters and will advise the Senate of such additional witnesses as promptly as possible. The estimated time of testimony for each witness is stated in our List of Potential Witnesses, which we also submit today.

John Baltar -- Same as Wiley Fairchild.

Karl Kepper -- Will describe Wiley's initial recollection of key events, before plea bargain pressure changed Wiley's testimony.

Reid Weingarten -- Same as Wiley Fairchild.

Maurice Dantin -- Will describe investigators' attempted intimidation and plea bargain with Bud Holmes.

Barry Hess -- Same as Wiley Fairchild (by transcript).

Respectfully submitted,

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Date: July 31, 1989

IN THE SENATE OF THE UNITED STATES
Sitting as a Court of Impeachment

In re)
)
IMPEACHMENT OF)
WALTER L. NIXON, JR.)

PRETRIAL STATEMENT OF THE HOUSE OF REPRESENTATIVES

The House of Representatives, through its Managers and counsel, submits its pretrial statement in the above matter pursuant to the Second Order of the Senate Impeachment Trial Committee.

I. Statement of the Case

This case involves repeated acts of misconduct by Walter L. Nixon, Jr., United States District Judge for the Southern District of Mississippi. Judge Nixon is only the second federal judge in the history of our country to be convicted of a crime during his judicial tenure. Judge Nixon was convicted of two counts of making false declarations to a grand jury, a form of perjury, and is currently in prison serving a five-year sentence.

Following an independent investigation, the House of Representatives, by vote of 417-0, has charged Judge

Nixon with three Articles of Impeachment. Each article rests upon grave misconduct that warrants Judge Nixon's removal from the Federal bench.

The Articles of Impeachment charge Judge Nixon with knowingly making false or misleading statements to federal law enforcement officials during an interview in Judge Nixon's chambers in Biloxi, Mississippi in April 1984, and in sworn testimony before a federal grand jury in July 1984. Both the interview and grand jury testimony occurred during a federal investigation of Judge Nixon's financial relationship with Hattiesburg businessman Wiley Fairchild and the unusual handling of the state criminal prosecution of Fairchild's son Drew, a co-conspirator in a plan to smuggle a planeload of marijuana through the Hattiesburg airport.

Article I deals with Judge Nixon's statement under oath to the grand jury that Forrest County District Attorney Paul Holmes, the State prosecutor who handled the Drew Fairchild drug smuggling case, never discussed the Drew Fairchild case with Judge Nixon. This specific statement was found by the jury in the criminal trial to be false, and resulted in Judge Nixon's conviction on one of the perjury counts. As a result of its independent investigation, the

House reached the same conclusion as the jury in finding this testimony to be false.

Article II deals with Judge Nixon's sworn statement to the grand jury that he had nothing whatsoever, officially or unofficially, to do with the Drew Fairchild case; never talked to anybody, including the State prosecutor, about the case; and never influenced anyone with respect to the case. This specific statement was also found by the jury to be false in Judge Nixon's criminal trial, and led to his conviction on a second count of perjury. As a result of its independent investigation, the House reached the same conclusion as the jury in finding this testimony to be false.

Article III charges Judge Nixon with undermining the integrity of the judiciary, disobeying the law and bringing disrepute on the courts by making a series of fourteen false or misleading statements during his recorded interview with federal investigators and in his sworn grand jury testimony. This series of statements conclusively establishes a conscious and deliberate effort by Judge Nixon to conceal the truth.

Article III re-alleges the grand jury testimony at issue in Articles I and II. In addition, Article III recites Judge Nixon's false statement to the grand jury that he knew of no reason he would have met with Wiley Fairchild after the Nixon-Fairchild investment was finalized in February 1981, testimony for which Judge Nixon was not indicted. Article III also includes seven statements by Judge Nixon in his interview with federal investigators including, inter alia, that Wiley Fairchild never brought up his son's case, that nothing was ever mentioned about Drew Fairchild, that Judge Nixon never talked with prosecutor Holmes about the Drew Fairchild case, and that the Judge didn't even know Drew Fairchild existed except for what he had read in the newspaper and learned during the interview. The House will prove that these interview and grand jury statements by Judge Nixon are just as false as the testimony for which he was convicted.

The evidence will show that in stark contrast to his interview statements and sworn grand jury testimony, Judge Nixon had conversations with three men--Wiley Fairchild, District Attorney Holmes, and Carroll Ingram (Wiley Fairchild's attorney)--concerning the Drew Fairchild drug smuggling case. The House of Representatives will establish that Judge Nixon remembered these conversations at the time of his interview and grand jury testimony, but instead chose to conceal the truth from law enforcement officials and the grand jury.

Judge Nixon's involvement in the drug smuggling case arose as a consequence of a lucrative oil and gas investment opportunity provided to him by Wiley Fairchild. Judge Nixon was grateful for the investment and told Fairchild, "if I can ever help you I will, and if I can't I'll just tell you I can't." In addition, Judge Nixon was interested in entering into other investments with Wiley Fairchild.

The evidence will show that Wiley Fairchild was dissatisfied with how his son's criminal drug smuggling case was being handled, and with the adverse publicity generated by the case. Because Judge Nixon had offered to help and was a long-time friend of District Attorney Holmes, Wiley Fairchild sought Judge Nixon's assistance.

Wiley Fairchild met with Judge Nixon and complained that Holmes was blackmailing him in connection with the drug case. That same evening, Judge Nixon met with Holmes and related Fairchild's complaints. Judge Nixon and Holmes talked about the drug case. Both Holmes and Judge Nixon then spoke with Fairchild on the telephone that same evening. Wiley Fairchild was told that his son's case would be taken care of to his satisfaction and that Judge Nixon should get the credit for helping Drew. To enhance the possibility of future investments with Wiley Fairchild, Judge Nixon also later advised Fairchild's attorney, Carroll Ingram, that at Fairchild's request he had spoken with Holmes about the Drew Fairchild case with positive results.

The evidence will show that Judge Nixon's involvement in the drug case was significant and influential. As a consequence of the Judge's involvement, Wiley Fairchild's complaints were satisfied and the case was temporarily "passed to the file" with no disposition, even though Drew Fairchild had pled guilty to the drug charges and was awaiting sentencing.

In Article III, the House of Representatives charges that the totality of Judge Nixon's misconduct warrants his removal from the federal bench. Judge Nixon's repeated false or misleading statements in his interview and before the grand jury are grossly inconsistent with the high standard of behavior expected of federal judges. Judge Nixon's lack of candor undermines the integrity of the judiciary and requires his removal from office.

Judge Nixon's interview statements and grand jury testimony fall far short of the truthfulness required of any ordinary witness, much less a man privileged to wear the robe of a federal judge. Judge Nixon's misdeeds demonstrate that he is unfit to perform such important tasks as assessing the credibility of others and seeking the truth in matters that come before the federal court. His decision to hide the truth and the predictable consequences of his conduct--his indictment, conviction, incarceration and suspension from the practice of law--stand as an embarrassment to the federal judiciary.

II. Witnesses

In view of the Impeachment Trial Committee's Order admitting into evidence prior testimony from Judge Nixon's criminal trial, post-conviction proceedings and the House Subcommittee hearings, the House of Representatives presently intends to call the following witnesses, in the order listed, to testify live in its case-in-chief against Judge Nixon.

1. **Kenneth White-Spunner**. c/o Federal Bureau of
Investigation, 10th and Pennsylvania Avenues, N.W.
Washington, D. C. 20353

Mr. White-Spunner was one of the FBI agents assigned to the federal investigation of Judge Nixon's investment with Wiley Fairchild and the handling of the

Drew Fairchild case. During Mr. White-Spunner's testimony, tapes of Judge Nixon's April 1984 interview and July 1984 grand jury testimony will be played.

Anticipated length of direct testimony -- five hours
(to include playing of tapes)

2. Wiley R. Fairchild. c/o Lawrence C. Gunn, Jr., Esq.
804 West Pine Street, P. O. Box 1588
Hattiesburg, Mississippi 39403

Mr. Fairchild will describe his financial relationship with Judge Nixon and his conversations concerning the Drew Fairchild drug smuggling case. Mr. Fairchild's testimony will help to establish the falsity of Judge Nixon's interview statements and grand jury testimony.

Anticipated length of direct testimony -- three hours

3. Paul H. "Bud" Holmes. c/o Patrick Fanning, Esq.
614 Tchoupitoulas Street
New Orleans, Louisiana 70130

Mr. Holmes, the state prosecutor in the Drew Fairchild case, will describe the Drew Fairchild case, his relationship with Judge Nixon, and the Judge's involvement in the case. Mr. Holmes' testimony will help to establish the falsity of Judge Nixon's interview statements and grand jury testimony.

Anticipated length of direct testimony -- three hours

4. Carroll Ingram.
307 West Pine Street
Hattiesburg, Mississippi 39403

Mr. Ingram will describe his knowledge of Judge Nixon's relationships with Mr. Fairchild and Mr. Holmes and the Judge's involvement in the Drew Fairchild case.

Mr. Ingram's testimony will help to establish the falsity of Judge Nixon's interview statements and grand jury testimony.

Anticipated length of direct testimony -- three hours

III. Proffer Concerning Judge Nixon's Oil and Gas Investment

Pursuant to the Impeachment Trial Committee's ruling on the parties' motions to exclude evidence, the House submits the following proffer of facts relating to Judge Nixon's oil and gas investment.

A. The Facts Concerning the Nixon-Fairchild Investment

The House of Representatives expects to prove that in February, 1979 Judge Nixon approached Carroll Ingram, who was a friend and a Hattiesburg, Mississippi, attorney who practiced before him. Feeling hampered by his judicial salary and hoping to generate additional income, Judge Nixon specifically asked Mr. Ingram about the possibility of making an oil investment with one of Mr. Ingram's clients, Hattiesburg construction and oil millionaire Wiley Fairchild. Judge Nixon did not know Wiley Fairchild personally at the time.

Thereafter, Judge Nixon checked on Wiley Fairchild's reputation with several persons, including Paul H. "Bud" Holmes, District Attorney for Forrest County, Mississippi during 1980-1984 and a close friend of Judge Nixon's for many years. Mr. Holmes told Judge Nixon that Wiley Fairchild had a reputation for getting close to influential people and that an oil investment with Mr. Fairchild would be "very, very safe," to the point that Mr. Fairchild would "pour oil down the hole" if necessary to make the investment profitable.

The evidence will show that in the spring of 1979, Judge Nixon attempted to contact Mr. Ingram to confirm the Judge's interest in investing with Wiley Fairchild. Judge Nixon called periodically to check if Mr. Ingram had discussed his request with Mr. Fairchild. Mr. Ingram felt "on the spot" about Judge Nixon's request and was reluctant to present the matter to Mr. Fairchild, to the point of avoiding the Judge's calls. However, Mr. Ingram ultimately approached Wiley Fairchild and asked him to put the Judge in an oil deal.

Wiley Fairchild had previously helped a former governor of Mississippi and the Mayor of Hattiesburg with investments so as to have "friends" in public office, and saw Judge Nixon as an influential man who might be able to help him in the future. Wiley Fairchild never offered mineral interests to the general public. Rather, he purchased oil and gas leases and then developed wells and kept the profit. Judge Nixon knew Mr. Fairchild was not in the business of selling oil interests to the public at large.

Wiley Fairchild searched his portfolio for oil and gas wells that would benefit Judge Nixon. Mr. Fairchild finally agreed to convey to the Judge partial interests in three wells, two in Mississippi and one in Alabama. Wiley Fairchild selected the wells himself, without any discussion with Judge Nixon. Mr. Fairchild selected three wells that he felt would be profitable for the Judge. There was no negotiation over the price or the specific wells. Mr. Fairchild was free to pick the wells he wanted and picked three of his best wells.

In the summer of 1979, Carroll Ingram told Judge Nixon that Wiley Fairchild would be "delighted" to put him in an investment. Judge Nixon contacted Mr. Ingram "a couple of times" thereafter to conclude the transaction, and was told by Mr. Ingram that Wiley Fairchild "is the kind of man you cannot push. He will take his own sweet time."

In February or March of 1980, Judge Nixon met Wiley Fairchild for the first time at the office of W.R. Fairchild Construction Company in Hattiesburg. By the end of the meeting, according to Judge Nixon, the two men had reached an agreement to enter into the investment. There was no negotiation over the price or other terms of the investment.

Over the next year Judge Nixon telephoned Wiley Fairchild frequently, perhaps more than ten times. In late February 1981, Mr. Fairchild directed Robert L. ("Skip") Jarvis, an employee in his office, to draw up documents conveying royalty interests in the three wells Fairchild had chosen for Judge Nixon. Mr. Fairchild did not identify the grantee and told Mr. Jarvis to leave the grantee portion blank. Mr. Jarvis completed an initial draft of the conveyances and forwarded them to Carroll Ingram for review. Mr. Ingram returned the draft documents to Wiley Fairchild. Mr. Fairchild then instructed Mr. Jarvis to revise the draft documents by tripling the acreage to be sold to Judge Nixon and by backdating the documents a year. During the first week of March, 1981, Mr. Jarvis prepared new documents backdated to February with increased acreage, backdated to February 25, 1980, with increased acreage.

By February 1981, when the documents were backdated, Wiley's son Drew had been identified by federal authorities as a co-conspirator in a major marijuana smuggling effort at the Hattiesburg Airport. During Judge Nixon's criminal trial, Department of Justice prosecutors suggested that the reason for the backdating was to avoid any suspicion that the investment was tied to Wiley Fairchild's concern that his son Drew might ultimately be prosecuted in federal court, either in front of Judge Nixon or another judge that Judge Nixon might assign.

Judge Nixon claims that the deeds were backdated to conform to the approximate date of the "gentleman's agreement," i.e. when Wiley Fairchild first agreed to sell the interests to Judge Nixon. However, Judge Nixon's position concerning the effective date of his agreement with Wiley Fairchild is inconsistent with the Judge's repayment of the debt he owed to Fairchild Construction Company as part of the transaction. It was only in 1984, after Judge Nixon was aware that federal authorities were investigating the transaction and more than a year after he had fully repaid all principal and other interest owed to Fairchild Construction, that Judge Nixon paid Fairchild Construction backdated interest for the period 1980-1981.

Nor are Judge Nixon's annual Judicial Financial Disclosure Reports wholly consistent with his testimony concerning the effective date of his investment. On the one hand, Judge Nixon claims that the agreement was effective in 1980. Yet he failed to report the transaction on his 1980 Financial Disclosure Report and belatedly paid the interest. The transaction was reported for the first time on Judge Nixon's 1981 Financial Disclosure Report, but only in an amended report. Judge Nixon's original 1981 report failed to mention the Fairchild transaction and was returned to him as inadequate.

The deeds ultimately executed by Wiley Fairchild and Judge Nixon state that the conveyances were not effective until the date the wells began production. The language of the conveyances suggests that if the wells failed to produce, Judge Nixon may have had no obligation to pay for the investment.

The House will prove that the investment with Mr. Fairchild was not available to the general public, and, moreover, was provided to Judge Nixon on highly favorable terms. Judge Nixon did not have to pay any money "up front" to finance the purchase of the mineral interests. Instead, Fairchild Construction Company loaned Judge Nixon the total purchase price of $9,500. As part of the loan Judge Nixon executed three promissory notes. The notes were signed by Judge Nixon in February 1981 even though they are dated February 1980.

Conflicting testimony was presented at Judge Nixon's trial as to the value of the mineral interests. Wiley Fairchild estimated the three mineral interests to be worth from $25,000-28,000 as of both the date he selected the wells and the date when the conveyances were finally prepared, although he testified the interests were worth less in the spring of 1980 because the wells were further from production and less was known about their potential. Mr. Fairchild testified at Judge Nixon's trial that in return for the conveyances, he wanted Judge Nixon to pay "something where it won't look like a hundred percent gift."

Wiley Fairchild admitted he sold Judge Nixon interests that were "undervalued", and pled guilty to the crime of giving an illegal gratuity. An oil expert familiar with the wells testified on behalf of the government at Judge Nixon's trial that the mineral interests conveyed to the Judge were worth over $53,000 on February 25, 1981, and about $21,000 one year before. However, an expert called by Judge Nixon at trial testified that the $9500 price paid by

Judge Nixon was fair market value for the mineral interests he received. Wiley Fairchild has repeatedly testified that he received less from Judge Nixon than what he could have obtained had he sold the interests on the open market.

The evidence shows that Mr. Fairchild selected good wells for Judge Nixon, increased the acreage conveyed, sold the interests for a price less than he could have received on the open market, and provided favorable financing to Judge Nixon. In February 1981, at the same time Judge Nixon received the documentation for the Fairchild transaction, the Judge was also entering into oil investments with other parties. In order to do so he borrowed $10,000 at 15% interest, the going market rate, repayable within 90 days, from The Mississippi Bank. At this same time, however, Fairchild Construction Company provided Judge Nixon with a $9,500 unsecured loan at only 10% interest, repayable over 3 years.

Wiley Fairchild met again with Judge Nixon in the late spring of 1981 after the mineral deeds had been delivered to the Judge by Mr. Ingram. On this occasion, Judge Nixon told Mr. Fairchild of his desire to generate additional income because of the anticipated expense of putting his children through college. At the time Judge

Nixon had a net worth of approximately $725,000 consisting in part of his home and other non-liquid assets. Judge Nixon has acknowledged that at the meeting, he thanked Mr. Fairchild for "putting him in a deal" and told him, ". . . if I can ever help you, I will and if I can't, I'll just tell you I can't."

Judge Nixon began receiving royalty checks from Fairchild Construction Company in February 1982. By the date of his criminal trial in early 1986, Judge Nixon had received over $60,000 from the three wells, which were expected to produce for another 12 to 20 years. By January 24, 1989, Judge Nixon had received over $73,000 from the Fairchild investment, and continues to receive regular income from the investment. Judge Nixon paid back the $9,500 notes with interest, but only after receiving royalty payments from Fairchild Construction Company in greater amounts so that he was never out-of-pocket.

Judge Nixon repaid his $9500 obligation to Fairchild Construction Company in advance of when payments were actually due. In his Congressional testimony, Judge Nixon claimed he pre-paid his debt to Mr. Fairchild so as to "save on the interest." Yet during the relevant time period Judge Nixon was equally indebted to banks at 15% interest, and had also borrowed approximately $10,000 on a personal line of credit at 18% interest. From the standpoint of "saving on the interest," it made little sense for the Judge to pre-pay a 10% debt even as he paid interest on loans at 15% and 18%. Judge Nixon's prompt repayment to Mr. Fairchild was at least in part motivated by the Judge's desire to enhance his relationship with Mr. Fairchild.

Indeed, Judge Nixon sought to become involved in additional mineral transactions with Wiley Fairchild. In the fall of 1982 the two men discussed the possibility of another investment. Wiley Fairchild testified that he considered putting Judge Nixon into a "Board of Education" well in Simpson County, Mississippi and mentioned the deal to the Judge, but did not put the Judge into the deal because the well "turned out to be no good."

The nature of Judge Nixon's lucrative oil and gas investment with Wiley Fairchild, his gratitude for the valuable investment opportunity, and his desire for additional investments are important facts that should be considered by the Senate in this impeachment. These facts place in context, and offer insight into, Judge Nixon's conversations with Wiley Fairchild, Bud Holmes and Carroll Ingram concerning the Drew Fairchild case. Perhaps most important, Judge Nixon's false statements during his interview and grand jury testimony reflect an effort to conceal a "favor" he provided to Fairchild as a consequence of the investment and the Judge's desire for other business opportunities.

The evidence will show that but for the existing investment and the hope of additional investment opportunities, Judge Nixon would never have become involved in the Drew Fairchild drug smuggling case. But for the investment, Wiley Fairchild would never have complained to Judge Nixon about being blackmailed in connection with the case. But for the investment and Judge Nixon's desire to enhance his financial relationship with Fairchild, the Judge never would have aided Fairchild. In short, the profitable investment and Judge Nixon's hope of making additional investments will be part of the House's showing of motive and intent in this case.

B. The House's Anticipated Presentation at Trial Concerning the Investment

The Impeachment Trial Committee's Order admitting prior testimony allows the House greatly to reduce its anticipated presentation at trial concerning the investment.

The foregoing factual proffer is based upon the prior sworn testimony of several witnesses, including Wiley Fairchild, Carroll Ingram and Judge Nixon himself. In view of the Committee's Order, the House is prepared to rely heavily on prior testimony concerning the investment.

Many of the relevant facts concerning the Nixon-Fairchild investment have also been included in the House's proposed stipulations. See proposed stipulation Nos. 35-84. Although to date Judge Nixon has declined altogether to respond to those stipulations, in view of the Committee's Order the House hopes for further cooperation from Judge Nixon, so that the Senate will know what facts concerning the investment are disputed.

Given the Committee's order concerning prior testimony, the House does not intend to call any witnesses who will testify exclusively as to the investment. With regard to Wiley Fairchild, Carroll Ingram and Bud Holmes, who will testify in person before the Committee to establish the falsity of Judge Nixon's interview and grand jury statements, the House intends to elicit some testimony concerning the investment sufficient to place Judge Nixon's statements in context and to show the Committee the significance of the investment. However, in recognition of the Committee's Order admitting prior testimony, the House will not present prolonged testimony concerning the details of the investment, since these facts are already in evidence before the Senate.

The House anticipates that at most only 2-3 hours of testimony on the investment will be presented during its case-in-chief. The time devoted to this issue can be even further reduced if Judge Nixon supplements his response to the House's proposed stipulations.

V. Prior Testimony

The House will rely on the prior criminal trial testimony of the following witnesses in lieu of seeking subpoenas for testimony in person during the House's case-in-chief:

Redditt Andrew ("Drew") Fairchild
Allen Jackson
Robert ("Skip") Jarvis
George Phillips
David Ward
Judge Jack Weldy
Glen L. White

Three witnesses who will testify in person during the House's case-in-chief--Wiley Fairchild, Carroll Ingram and Paul H. "Bud" Holmes--also testified at length in both the criminal trial and House Subcommittee proceedings. The House expects to elicit the key testimony from each of these witnesses during their appearance before the Committee, but nevertheless directs the Committee's attention to the prior criminal trial and House impeachment testimony of these three witnesses.

During the course of its case-in-chief, the House will also present excerpts of the prior testimony of Walter L. Nixon, Jr., as party admissions.

V. Exhibits

A numbered list of exhibits that the House of Representatives intends to introduce in its case-in-chief is attached hereto. The exhibit list includes citations to the criminal and House Subcommittee proceedings. Copies of the exhibits will be provided to Respondent and the Committee as directed.

VI. Conduct of Evidentiary Proceedings

The House of Representatives anticipates that a total of 3 trial days will be necessary to present its case-in-chief. At the present time the House anticipates no problem in the presentation of its direct case.

VII. Legal Principles

Impeachment is not a criminal proceeding, nor is it designed to punish further a judge who, as in this case, has been convicted of a crime and is serving a prison sentence. Rather, impeachment is a remedial measure, entrusted to the Congress under our Constitution, that protects the public by removing from office persons who are unfit to hold high positions of public trust.

Criminal conduct is not a prerequisite for impeachment. Historically, civil officials have been impeached and removed from office based upon conduct that would not be a violation of the criminal law. But in this case, as in that of the 1986 impeachment of Judge Harry Claiborne of Nevada, the conduct at issue warrants both punishment under the criminal law and impeachment.

The House of Representatives has charged Judge Nixon with three Articles of Impeachment, resting upon misdeeds that are wholly unacceptable for a person granted the privilege of serving on the federal bench. Judge Nixon's misconduct is clearly criminal. Giving false testimony to a grand jury is a felony in violation of 18 U.S.C. Section 201(g). Making false statements to federal agents and concealing information during a federal investigation is also a felony. See 18 U.S.C. Section 1001. The Articles of Impeachment, however, do not charge that a particular criminal statute has been violated. Rather, the House alleges that Judge Nixon's conduct constitutes "high crimes and misdemeanors" as that term is used in the Constitution, warranting his removal from office.

Because impeachment is not a criminal proceeding, the strict standard of proof "beyond a reasonable doubt," applicable in criminal proceedings, should not apply. During the Claiborne impeachment, by vote of 75 to 18, the Senate rejected Judge Claiborne's motion to designate the "beyond a reasonable doubt" as the standard of proof in impeachments.[1] Of course, with regard to the statements of Judge Nixon at issue in Articles I and II, the jury in the criminal trial determined that these statements were false "beyond a reasonable doubt" in finding Judge Nixon guilty of perjury.

The Articles of Impeachment charge Judge Nixon with knowingly giving false or misleading testimony under oath before a federal grand jury. The House will prove that Judge Nixon repeatedly violated his oath to tell the truth. It is difficult to imagine an act more subversive to the legal process than lying from the witness stand. A judge who violates his testimonial oath and seeks to mislead a grand jury is clearly unfit to remain on the bench. If a judge's truthfulness cannot be guaranteed, if he sets less than the highest possible standard for candor in the courthouse, how can ordinary citizens who are witnesses in court be expected to abide by their testimonial oath?

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[1] Proceedings of the United States Senate in the Impeachment Trial of Harry E. Claiborne, 99th Cong., 2d Sess., S. Doc. 99-48 at 148-150.

Article III also charges Judge Nixon with concealing his conversations with Messrs. Fairchild, Holmes and Ingram by giving--false or misleading statements in an interview with federal law enforcement officials. Again, such conduct is particularly destructive to the legal process. Effective law enforcement is predicated upon the notion that persons with knowledge relevant to an investigation must provide truthful and complete information. Judge Nixon failed to satisfy this basic civic responsibility required of every American.

In Article III, the House charges Judge Nixon with concealing information through false statements in his interview with federal investigators and in sworn testimony before a federal grand jury. The House alleges that by making "one or more" false or misleading statements to investigatory officials and "one or more" false or misleading statements to the grand jury, Judge Nixon has disobeyed the law and impugned the integrity of the federal judiciary. Article III is modeled upon similar omnibus articles, voted upon by the Senate in other recent impeachments, that recited the judge's collective and the impact of such misconduct on judicial integrity. See the House of Representatives' Response to Judge Nixon's Motion to Dismiss Impeachment Article III.

Respectfully submitted,

The United States
House of Representatives

By_________________________
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Special Counsel

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EXHIBITS TO OFFERED BY THE HOUSE OF REPRESENTATIVES IN ITS CASE-IN-CHIEF

1. Transcript of 4/19/84 interview of Judge Nixon by law enforcement officials [Trial Defense Ex. 43A; Subcomm. Ex. 22, revised per agreement of parties]

   1a. -- Tape of Interview [Trial Defense Ex. 43]

2. Transcript of 7/18/84 grand jury testimony of Judge Nixon [Trial Gov't Ex. 1; Subcomm. Ex. 23]

   2a. -- Tape of grand jury testimony [Trial Defense Ex. 44]

3. Excerpts of interview and grand jury testimony at issue in articles of impeachment

4. Royalty Deeds (1981) [Trial Gov't Exs. 8, 9, 10; Subcomm. Ex. 3]

5. Royalty Deeds (1980) [Trial Gov't Exs. 12, 13, 14; Subcomm. Ex. 4]

6. Promissory Notes [Trial Gov't Exs. 15, 16, 17; Subcomm. Ex. 5]

7. Royalty Payments summary [Trial Gov't Ex. 26; Subcomm. Ex. 11]

8. Royalty payments to Nixon [Trial Gov't Ex. 18; Subcomm. Ex. 9]

9. Loan payments by Nixon [Trial Defense Ex. 19; Subcomm. Ex. 10]

10. Letter Fairchild to Keith, 1/24/89 [Subcomm. Ex. 15, 3/2/89]

11. Wiley Fairchild indictment [Subcomm. Ex. 25]

12. Wiley Fairchild plea agreement and letter [Trial Defense Exs. 28 and 29; Subcomm. Ex. 28]

13. Wiley Fairchild sentence [Subcomm. Ex. 38]

14. Indictment of Nathan, Torres & Hatfield [Trial Gov't Ex. 7; Subcomm. Ex.1]

15. Memo of Understanding re Drew Fairchild [Trial Gov't Ex. 2; Subcomm. Ex. 2]

16. State Court Indictment of Drew Fairchild [Trial Gov't Ex. 3; Subcomm. Ex.7]

17. Guilty Plea of Drew Fairchild in State Court, 1/12/82 [Subcomm. Ex. 8]

18. Continuance orders -- Drew Fairchild Case [Nixon Subcomm. Ex. N-1 (A) through (J)]

19. Order passing Drew Fairchild case to file [Trial Gov't Ex. 4; Subcomm. Ex. 18]

20. Order and Motion reinstating Drew Fairchild case to file [Trial Defense Ex. 7; Subcomm. Ex. 19]

21. Holmes Calendar 1982 (Excerpts) [Trial Gov't Ex. 20]

22. Marriage License [Motion for New Trial Gov't Ex. 3; Subcomm. Ex. 15]

23. Holmes indictment [Subcomm. Ex. 31]

24. Holmes plea agreement and information [Gov't Trial Ex. 23; Subcomm. Ex. 33]

25. Holmes sentence [Subcomm. Ex. 39]

26. Excerpts from prior sworn trial and House Subcommittee testimony of Judge Nixon

27. Dental Records, 5/14/82 [Motion for New Trial Gov't Ex. 4; Subcomm. Ex. 14]

28. Nixon indictment [Subcomm. Ex. 37]

29. Verdict sheet, U.S. v. Nixon [Subcomm. Ex. 41]

30. Nixon sentence [Subcomm. Ex. 42]

31. District court opinion in U.S. v. Nixon -- new trial motion [Subcomm. Ex. 43]

32. 5th Circuit Opinion in U.S. v. Nixon [Subcomm. Ex. 44]

33. 5th Circuit En Banc opinion in U.S. v. Nixon [Subcomm. Ex. 45]

34. Supreme Court denial of cert. in Nixon v. U.S. [Subcomm. Ex. 46]

35. Mississippi State Bar v. Nixon. [Subcomm. Ex. 48]

36. Certificate of the Judicial Conference [Subcomm. Ex. 50]

37. Ruling of District Court on motion to vacate in Nixon v. U.S.

38. Ruling of District Court on motion to reduce Nixon sentence

COMMITTEE ASSISTANCE WITH DISCOVERY

IN THE SENATE OF THE UNITED STATES
Sitting As A Court Of Impeachment

In Re)
IMPEACHMENT OF)
WALTER L. NIXON, JR.)

JUDGE NIXON'S REQUEST FOR ASSISTANCE IN SECURING DISCOVERY FROM THE DEPARTMENT OF JUSTICE

Judge Walter L. Nixon, Jr., through his undersigned counsel, respectfully requests the assistance of the Senate in securing responsive discovery materials from the United States Department of Justice, and in support of this Request states the following:

1. On June 1, 1989, counsel for Judge Nixon asked the Justice Department, by letter, for access to files relevant to this impeachment proceeding. (*See* Attachment 1.) On June 21, 1989, the Justice Department replied by letter that it would not provide any of the requested materials. (*See* Attachment 2.)

2. It is our understanding that when a similar situation arose recently in the *Hastings* impeachment proceeding, a procedure was developed to permit discovery of Justice Department materials through the good offices of the Senate. It is our further understanding that, pursuant to that arrangement, Senate personnel reviewed Justice Department materials and designated for production to the impeachment respondent those materials that were relevant to any impeachment article or asserted defense.

3. We request that a similar procedure be implemented with respect to our discovery requests. The conduct of the Justice Department investigation has been placed squarely in issue here: at least one witness has testified that he testified falsely at Judge Nixon's trial in order to curry favor with the prosecution, while other witnesses have described heavy-handed and oppressive prosecution tactics. In these circumstances, denying Judge Nixon access to the Justice Department materials would unfairly hamper his ability to present a defense. There is surely no basis whatever to provide less discovery to Judge Nixon than was afforded to Judge Hastings. Moreover, it is our understanding that Special Impeachment Counsel for the House Managers have had access to the materials that we seek to review.

For all of the foregoing reasons, we request that the Senate implement a procedure to ensure that relevant materials from the Justice Department files be made available to Judge Nixon.

Respectfully submitted,

Boyce Holleman / DOS
BOYCE HOLLEMAN
MICHAEL B. HOLLEMAN
BOYCE HOLLEMAN, P.A.
P.O. Drawer 1030
Gulfport, MS 39502
(601) 863-3142

David O. Stewart
DAVID OVERLOCK STEWART
SETH W. BREWSTER
ROPES & GRAY
1001 Pennsylvania Ave., N.W.
Suite 1200 South
Washington, D.C. 20004
(202) 626-3900

Date: July 7_, 1989

ROPES & GRAY
1001 PENNSYLVANIA AVENUE, N. W.
SUITE 1200 SOUTH
WASHINGTON, D. C. 20004
(202) 626-3900
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BOSTON, MASSACHUSETTS 02110-2624
(617) 951-7000
TELECOPIER: (617) 951-7050

30 KENNEDY PLAZA
PROVIDENCE, R. I. 02903
(401) 521-6400
TELECOPIER: (401) 521-0910

June 1, 1989

BY HAND

Richard L. Thornburgh
Attorney General
Department of Justice
10th Street & Constitution Ave., N.W.
Room 5111
Washington, D.C. 20530

Dear Mr. Thornburgh:

I write as counsel to Judge Walter L. Nixon, Jr., of the United States District Court for the Southern District of Mississippi, to request the opportunity to review and make copies of certain materials in your agency's possession in order to prepare the Senate trial concerning the impeachment of Judge Nixon.

The materials we request are modelled after the discovery already provided to Judge Alcee L. Hastings (S.D. Fla.) in the current Senate proceeding concerning his impeachment, and include the following:

1. All transcripts of grand jury testimony of the Special Grand Jury impanelled on July 18, 1984 in Hattiesburg, Mississippi and any other grand jury (including any grand jury in Tallahassee, Florida) thát have heard testimony relating to any allegations concerning Judge Nixon.

2. All documentary exhibits and other materials received by the grand juries referred to in the proceeding paragraph.

3. FBI and Justice Department investigative files that have been reviewed by the House Impeachment Counsel since March of 1988, including the memoranda

recommending prosecution of Paul W. "Bud" Holmes of Hattiesburg in 1985, Wiley Fairchild of Hattiesburg in 1984, and Judge Nixon in 1985.

Because of the Senate's interest in moving the impeachment proceeding to conclusion in a prompt manner, I would appreciate a prompt response to this request.

Very truly yours,

David O. Stewart

David Overlock Stewart

DOS/paa

cc: Alan Baron, House Impeachment Counsel
Michael Davidson, Senate Counsel
G. McDowell, Chief, Public Integrity Section

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General

Washington, D.C. 20530

JUN 21 1989

David O. Stewart, Esq.
Ropes & Gray
1001 Pennsylvania Avenue, N.W.
Suite 1200 South
Washington, D.C. 20004

Dear Mr. Stewart:

Re: Walter L. Nixon, Jr.

Your letter to the Attorney General dated June 1, 1989, requesting certain documents contained in the files of the Department of Justice has been referred to the Criminal Division for response. You state that you seek these documents so that you may prepare for the upcoming impeachment trial concerning your client, and that your request is "modelled after the discovery already provided to Judge Alcee L. Hastings (S.D. of Fla.). . . ." After reviewing your request we have determined that your request must be declined.

As I am sure you are aware, the Department of Justice did not provide any discovery to Judge Hastings in connection with his impeachment trial. We understand that his discovery is being provided by the Congress.

The first two categories of items you request are covered by Rule 6(e) of the Federal Rules of Criminal Procedure, and may not be provided to you without a court order. As you recall, you previously sought a court order for such disclosure and your petition was denied on December 5, 1988. Accordingly, we must decline to provide you with the documents you request in categories 1 and 2.

The third category of items you request covers materials which were reviewed by the House Impeachment Committee, including certain prosecution memoranda. We decline to grant this request as to the documents you specifically identify because they reflect the internal decision-making process within the

Department of Justice. As such, they are privileged and irrelevant to the conduct which underlies the articles of impeachment. Furthermore, your request is too generalized to allow us to respond concerning the other documents which would be included within the request. If you will identify the other specific documents you seek, we will consider your request further. Accordingly, at this time we decline to provide you with the documents you request in category 3.

Sincerely,

Edward S.G. Dennis, Jr.
Assistant Attorney General

By: John C. Keeney
Deputy Assistant Attorney General
Criminal Division

cc: Alan I. Baron
Special Counsel
Impeachment Staff

Michael Davidson
Senate Legal Counsel

United States Senate
WASHINGTON, DC 20510

July 18, 1989

John C. Keeney, Esq.
Deputy Assistant Attorney General
Criminal Division
Department of Justice
Washington, D.C. 20530

Dear Mr. Keeney:

As Chairman of the Senate Impeachment Trial Committee on theArticles of Impeachment against Judge Nixon, I write to request the Department's assistance in the Committee's efforts to assure that Judge Nixon receives a fair trial in the Senate. The Committee has determined that it would make a useful contribution to the trial process if the Department were willing to permit the Committee, through its staff, to review the documents (excluding grand jury materials governed by Rule 6(e)) in the possession of the Department, including those possessed by the Federal Bureau of Investigation, that were requested by Judge Nixon in his June 1, 1989 letter to the Attorney General, which was the subject of your response on June 21, 1989.

The review would be consistent with that conducted in the case of the Hastings impeachment matter. That is, the focus of the review would be to determine if there is evidence that the investigations were conducted in a manner intended to mislead a court or trier of fact as to Judge Nixon's guilt or innocence. In the event that it is determined that particular documents should properly be made part of the pending impeachment proceedings, and accordingly made available to the parties for use at trial, the committee would hear from the Department prior to disclosing any documents that you believe contain particularly sensitive matters, so that we may address any continuing concerns that you have. No documents or portions of documents would be made available to the parties without the consent of the Department.

Your expeditious response to this request would be most helpful to the committee in attempting to complete discovery by July 31st.

Sincerely,

Wyche Fowler Jr.

Wyche Fowler, Jr.

U.S. Department of Justice

Washington, D.C. 20530

AUG 1 1989

Donald A. Purdy, Jr., Esq.
Counsel to the Committee
United States Senate Impeachment
  Trial Committee
Room Sh-902D
Hart Senate Office Building.
Washington, D.C. 20510

Dear Mr. Purdy:

Re: United States District Judge Walter L. Nixon, Jr.

Pursuant to the request of Senator Wyche Fowler, Jr., Chairman of the Senate Impeachment Trial Committee, the Department of Justice is providing the documents the Committee has requested concerning the investigation and prosecution of United States District Court Judge Walter L. Nixon, Jr. In some cases, where noted, redactions have been made to the documents to delete attorney work product. The documents provided are as follows:

1. Draft FBI Form, 302 Report of Interview of Stewart Sargent (4 pages).
2. Transcript of proffer of Wylie Fairchild on November 1, 1984 (9 pages).
3. Handwritten chronology (4 pages).
4. Memo, "Prosecution Memorandum of Carroll Ingram," dated December 7, 1984 (2 pages after redaction).
5. Memo, "Recommendation to Prosecute Paul H. 'Bud' Holmes," dated March 22, 1985 (9 pages after redaction).
6. Polygraph Report on Paul Hardin Holmes, dated July 12, 1985 (4 pages).
7. Handwritten notes (5 pages).
8. Handwritten "Drew Chronology" (9 pages).
9. Memo, "Request for Authorization to Indict Reditt 'Drew' Fairchild," dated March 18, 1985 (2 pages).

10. Memo, "Recommendation to Prosecute Drew Fairchild," dated March 22, 1985 (3 pages).

11. "Chart" (2 pages).

12. FBI Memo From SA Jerry Ripley to SAC Jackson, dated July 6, 1981 (2 pages).

13. Memo, "Recommendation to Prosecute United States District Judge Walter L. Nixon," dated July 9, 1985 (9 pages after redaction).

14. Memo, "Recommendation to Prosecute United States District Judge Walter L. Nixon," dated July 22, 1985 (9 pages after redaction).

15. Memo, "Request for Authorization to Apply for Disclosure of Tax Returns -- Walter L. Nixon," dated July 9, 1985 (2 pages).

16. Memo, "United States v. Paul H. 'Bud' Holmes: Marshals Service Staffing," dated June 6, 1985 (4 pages).

17. Handwritten notes, "Wallace Gunn TC 10/2/85" (1 page).

18. Memo, "Mississippi Investigation," dated April 30, 1984 (3 pages after redaction).

19. FBI Form 302, Report of Interview of Elma Manasco, dated November 6, 1984 (1 page).

20. Handwritten notes, first page headed "Weldon Kennedy," dated March 5, 1984 (13 pages).

21. FBI Form 302, Report of Interview of Thomas L. Dial, dated August 28, 1984 (2 pages).

22. FBI Form 302, Report of Interview of Captain James R. Kelly, dated January 24-25-26, 1984 (3 pages).

23. FBI Form 302, Report of Interview of Tom Dial, dated November 15, 1983 (2 pages).

24. FBI Form 302, Report of Interview of Robert Royals, dated January 9, 1986 (2 pages).

25. Handwritten note, headed "Ingram" (3 pages).

26. FBI Form 302, Report of Interview of Billy Riley, dated November 28, 1984 (2 pages).

27. Handwritten note, headed "Bud and Fanning . . ." (1 page).

28. Letter from Jack Morton, Deputy Regional Counsel, IRS, to Honorable Glenn L. Archer, Jr., Assistant Attorney General, Tax Division, dated December 16, 1985 (5 pages).

29. Memo, "Status Report re: The Petit Bois Bribe Investigation," dated November 19, 1985 (20 pages after redaction).

30. Handwritten notes, headed "McMullan Proffer" (10 pages).

31. "Daily Report" for May 7, 1985 (2 pages).

32. "Walter Louis Nixon, Jr., ET AL, Narcotics Case - Background" (18 pages).

Should the Committee have any further questions concerning this matter, please feel free to contact me at 786-5059.

Sincerely,

James M. Cole
Deputy Chief
Public Integrity Section
Criminal Division

Enclosures

U.S. Department of Justice

Washington, D.C. 20530

AUG 11 1989

Mr. Donald A. Purdy, Jr.
Counsel
Senate Impeachment Trial Committee
902 Hart Senate Office Building
Washington, D.C. 20510

Dear Mr. Purdy:

Re: United States District Judge Walter L. Nixon, Jr.

Pursuant to the supplemental request of the Senate Impeachment Trial Committee, the Department of Justice is providing the additional documents concerning the investigation and prosecution of Judge Walter L. Nixon, Jr. Those documents are as follows:

1. Transcript of Grand Jury testimony of Carroll Ingram on February 21, 1985 (47 pages).
2. Handwritten notes headed "Baltar File" (1 page).
3. Handwritten notes headed "Ingram Proffer Joel Blast Office 1/16/85" (4 pages).
4. Handwritten notes headed "Ingram File Proffer in D.C. 1/29/85" (15 pages).
5. Handwritten notes headed "Ingram Feb 12, 1985 Baton Rouge" (6 pages).
6. Handwritten notes headed "Ingram" (8 pages).
7. Handwritten notes headed "Ingram" (1 page).
8. Handwritten notes headed "Ingram Misc" (9 pages).
9. Handwritten notes headed "Ingram" (1 page).
10. Handwritten notes headed "Ingram" (1 page).

11. Handwritten notes headed "Bud Holmes File" (5 pages).
12. Handwritten notes headed "Bud - Drews case" (1 page).
13. Handwritten notes headed "Holmes --> Baltar" (1 page).
14. Handwritten notes (1 page).
15. Handwritten notes headed "Facts of Drews case" (1 page).
16. Handwritten notes headed "Katie" (1 page).
17. Handwritten notes headed "Katie" (1 page).
18. Handwritten notes headed "Drew State Pros File" (15 pages).
19. Letter from R.A. Fairchild, To Whom It May Concern, dated June 20, 1983 (1 page).
20. Handwritten notes headed "Leave grantee blank" (1 page).
21. Letter from Dantin & Dantin to Frank D. Montague, Jr., dated June 5, 1985 (2 pages).
22. Typed and handwritten notes (2 pages).
23. Handwritten notes headed "Matison" (1 page).
24. Typed and handwritten notes headed "Bud Holmes re: Bob Stockett" (1 page).
25. FBI teletype from Jackson to Director, FBI, dated July 1985 (7 pages).

Of the documents listed above, the only one which has not been delivered to you is the FBI teletype, described in item 25 above. I am enclosing three copies of that document with this letter. Should the Committee have any questions concerning this matter, please feel free to contact me at my office.

Sincerely,

James M. Cole
Deputy Chief
Public Integrity Section
Criminal Division

Enclosures

AMENDMENT OF SENATE RESOLUTION 128 TO CLARIFY THE AUTHORITY OF THE COMMITTEE

[From the Congressional Record—Senate, August 3, 1989]

Mr. MITCHELL. Mr. President, on behalf of Senators Fowler and Hatch, I send a resolution to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The resolution will be stated by title.

The assistant legislative clerk read as follows:

A resolution (S. Res. 167) to amend Senate Resolution 128, 101st Congress, relating to the appointment of a committee to hear the articles of impeachment against Judge Walter L. Nixon, Jr., to clarify the authority of the Committee to use the detailed personnel of any Government department or agency.

The PRESIDING OFFICER. Is there objection to the present consideration of the resolution?

There being no objection, the Senate proceeded to consider the resolution.

The PRESIDING OFFICER. The question is on agreeing to the resolution.

The resolution (S. Res. 167) was agreed to.

The resolution reads as follows:

S. RES. 167

Resolved, That section 6 of Senate Resolution 128, 101st Congress (agreed to May 11, 1989), is amended by—

(1) inserting "(a)" after "Sec. 6."; and

(2) adding at the end thereof the following:

"(b) In carrying out its powers, duties, and functions under this resolution, the committee is authorized to, in its discretion and with the prior consent of the Government department or agency concerned and the Committee on Rules and Administration, to use on a reimbursable, or nonreimbursable, basis the services of personnel of any such department or agency.".

Mr. MITCHELL. Mr. President, I move to reconsider the vote by which the resolution was agreed to.

Mr. DOLE. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

101st CONGRESS
1st Session

S. RES. 167

To amend Senate Resolution 128, One Hundred First Congress, relating to the appointment of a committee to hear the articles of impeachment against Judge Walter L. Nixon, Jr., to clarify the authority of the Committee to use the detailed personnel of any Government department or agency.

IN THE SENATE OF THE UNITED STATES

August 3 (legislative day, January 3), 1989

Mr. Mitchell (for Mr. Fowler) (for himself and Mr. Hatch) submitted the following resolution; which was considered and agreed to

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RESOLUTION

To amend Senate Resolution 128, One Hundred First Congress, relating to the appointment of a committee to hear the articles of impeachment against Judge Walter L. Nixon, Jr., to clarify the authority of the Committee to use the detailed personnel of any Government department or agency.

Resolved, That section 6 of Senate Resolution 128, One Hundred First Congress (agreed to May 11, 1989), is amended by—

(1) inserting "(a)" after "Sec. 6."; and

(2) adding at the end thereof the following:

"(b) In carrying out its powers, duties, and functions under this resolution, the committee is authorized to, in its discretion and with the prior consent of the Government department or agency concerned and the Committee on Rules and Administration, to use on a reimbursable, or nonreimbursable basis, the services of personnel of any such department or agency.".

○

PRETRIAL FILINGS (Continued)

IN THE SENATE OF THE UNITED STATES
Sitting As A Court Of Impeachment

In re)
IMPEACHMENT OF)
WALTER L. NIXON, JR.)

JUDGE NIXON'S POTENTIAL WITNESS LIST AND DESIGNATION OF RECORD EVIDENCE

The following list of potential witnesses has been prepared to provide notice to the Senate and to the House Managers of those individuals who might be called as witnesses on behalf of Judge Nixon. We will not necessarily call each of these individuals as witnesses, and we may not be able to decide whether to call each witness until we have seen the case that is presented by the House Managers. By the same token, we may yet determine that other individuals should be called as witnesses, and thus reserve the right to designate such additional witnesses when they come to our attention. The following individuals, however, are the only witnesses that we currently believe are potential witnesses on behalf of respondent in the Senate trial.[1] We have provided estimates of likely time for direct testimony, but

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[1] We have not identified any witnesses relating to the Boam and Seymour civil cases, which are never mentioned in the Articles of Impeachment and are absolutely irrelevant to this proceeding.

PWTNSLST.NX

caution that those estimates may well prove inaccurate. As respondent in this proceeding, we are unable to indicate the likely order in which witnesses will be called; that determination depends on the progress of the trial.

A. Potential Witnesses

John Baltar -- Mr. Baltar formerly served as administrative assistant to Wiley Fairchild and was deeply involved in Mr. Fairchild's relationship with Judge Nixon's prosecutors. He can testify concerning promises that the prosecutors made to Mr. Fairchild to induce his cooperation, and about how Mr. Fairchild changed his testimony to adopt the facts proposed by the prosecutor (one hour). Address is 500 Graymont, Suite B, Jackson, MS 39202.

Tom Brennan -- A reporter, now with a Florida newspaper, Mr. Brennan can testify about statements outside the courtroom by the lead prosecutor at Judge Nixon's trial (10 minutes, or by stipulation). Address is c/o Tampa Tribune, P.O. Box 191, Tampa, FL 33601.

Maurice Dantin -- Mr. Dantin served as counsel for Paul "Bud" Holmes, and can testify concerning pressures exerted on Mr. Holmes by federal prosecutors and deals offered by those prosecutors (10 minutes). Address is Dantin & Dantin, Suite 301, Citizens Bank Building, P.O. Box 604, Columbia, MS 39429.

Drew Fairchild -- Mr. Fairchild, the son of Wiley Fairchild, can testify concerning developments in his own criminal prosecution and actions by both prosecutor Paul "Bud" Holmes and his own counsel, William Porter (45 minutes). Address is 1215 Windsor Drive, Hattiesburg, MS 39401.

Rodney Fairchild -- The brother and business partner of Wiley Fairchild, Mr. Fairchild can testify concerning the meeting between Judge Nixon and Wiley Fairchild that preceded the telephone call to Wiley Fairchild's home that was placed from Bud Holmes' farm (10 minutes). Address is c/o W.R. Fairchild Construction Co., Ltd., P.O. Box 1857, Hattiesburg, MS 39401.

Wiley Fairchild -- Mr. Fairchild operates a successful construction business and an oil and gas development company. He can testify concerning his conversation with Judge Nixon relating his suspicions that Bud Holmes was blackmailing him, and the subsequent telephone call he received from Bud Holmes' farm. Mr. Fairchild can also testify concerning the promises made to him by federal prosecutors and the pressures placed on him during the investigation to come up with a "smoking gun" against Judge Nixon (one hour). Address is c/o

W.R. Fairchild Construction Co., Ltd., P.O. Box 1857, Hattiesburg, MS 39401.

James Halsted -- A professor at the University of South Florida, Mr. Halsted can confirm the authenticity of two tape recordings of telephone interviews he conducted with Bud Holmes about the Nixon case after the trial was over. (10 minutes, or by stipulation.) Address is Department of Criminology, University of South Florida, Tampa, FL 33620.

Geoffrey C. Hazard, Jr. -- Sterling Professor of Law at Yale Law School and the Director of the American Law Institute, Prof. Hazard is the leading expert on legal and judicial ethics in this country. He can testify concerning the propriety of Judge Nixon's conversations with Wiley Fairchild and Paul "Bud" Holmes that are at issue in this case (45 minutes). Address is c/o Yale Law School, 401A Yale Station, New Haven, CT 06520-7397.

Barry Hess -- Having served as counsel to both Wiley Fairchild and Drew Fairchild, Mr. Hess might testify concerning the promises made to both men by the federal prosecutors and the elements of his clients' plea bargains. (By transcript from the post-conviction hearing.) Address is Hess, Atchison & Horne, 301 St. Joseph Street, P.O. Box 1706, Mobile, AL 36633.

Boyce Holleman -- Counsel to Judge Nixon, Mr. Holleman can testify concerning the circumstances of Wiley Fairchild's recantation of his trial testimony (10 minutes, or by stipulation). Address is P.O. Drawer 1030, 1913 15th Street, Gulfport, MS 39502.

Michael B. Holleman -- Counsel to Judge Nixon, Mr. Holleman can testify concerning the discovery in the records of Fairchild Construction Co. of notes and outlines of testimony which later proved to be in the handwriting of Reid Weingarten, the lead prosecutor (10 minutes, or by stipulation). Address is P.O. Drawer 1030, 1913 15th Street, Gulfport, MS 39502.

Paul "Bud" Holmes -- Former State's Attorney for Forrest County, Mississippi, Mr. Holmes can testify that (i) Judge Nixon stopped him from discussing the Drew Fairchild case with the judge, (ii) Judge Nixon did not attempt to influence his handling of the Drew Fairchild prosecution, and (iii) about the Drew Fairchild case (one hour). Address is 179 Indian Mound Lane, Slidell, LA 70461.

Carroll Ingram -- If the Committee allows testimony concerning Judge Nixon's purchase of oil properties from Wiley Fairchild -- which has no direct relevance to the

Articles of Impeachment, Mr. Ingram can testify concerning the complete propriety of the transaction, for which he handled the legal documentation. Mr. Ingram also can testify about Bud Holmes' attempts to persuade him to change his testimony, and concerning Holmes' statements about the events surrounding the phone call from the farm. (90 minutes.) Address is 307 West Pine, Hattiesburg, MS 39401.

Karl Kepper -- Having served as counsel to both Wiley Fairchild and Drew Fairchild, Mr. Kepper might testify concerning Wiley Fairchild's initial recollection of the telephone call from Bud Holmes' farm, before that recollection was altered in response to pressure from the federal prosecutors (15 minutes). Address is 327 North 25th Avenue, Hattiesburg, MS 39401.

David Massey -- An attorney and oil investor in Mississippi, Mr. Massey has reviewed the three oil interests purchased by Judge Nixon from Wiley Fairchild. Mr. Massey concluded that at the time that the sale was agreed to in early 1980, the sale price of the properties of $9,500 represented fair market value. (By designation of trial transcript, pp. 1378-1407).

Katie Matison -- Former Assistant State's Attorney working for Paul "Bud" Holmes, Ms. Matison was assigned to handle the Drew Fairchild prosecution. Ms. Matison can testify concerning Mr. Holmes' efforts to intimidate her into concealing the true facts of the Drew Fairchild case (20 minutes). Address is P.O. Box 284, Hattiesburg, MS 39401.

Richard McKenzie -- Judge of the Forrest County Circuit Court, Judge McKenzie can testify concerning the Drew Fairchild case which was before him (20 minutes). Address is 316 Forrest Street, Hattiesburg, MS 39401.

Walter L. Nixon, Jr. (Two and one-half hours).

George Phillips -- United States Attorney for the Southern District of Mississippi, Mr. Phillips can testify concerning his office's failure to prosecute the Drew Fairchild case and the transfer of the case to state jurisdiction at Bud Holmes' request (20 minutes). Address is U.S. Attorney, SDM, P.O. Box 2091, Jackson, MS 39205.

Robert Royals -- A former business associate of both Wiley Fairchild and Drew Fairchild, Mr. Royals was convicted of drug smuggling charges similar to those brought against Drew Fairchild. Mr. Royals had served as a pilot for Paul "Bud" Holmes and was a close friend of William Porter, who was counsel to Drew Fairchild. Mr. Royals can testify about Mr. Porter's statements concerning the Drew Fairchild case and about his own conversations with Wiley Fairchild about the case (30 minutes). Address is 3009 Navajo Circle, Hattiesburg, MS 39402.

Counsel for Judge Nixon has spoken to Mr. Royals about testifying at this trial, and Mr. Royals stated that he would not testify without a grant of immunity. Counsel for Judge Nixon thereafter spoke with Mr. Royals' lawyer, Rex Jones of Hattiesburg, who confirmed that Mr. Royals will assert his Fifth Amendment privilege against testifying unless he is granted testimonial immunity.

Fred Strasser -- A reporter, Mr. Strasser can testify concerning statements made by the lead prosecutor outside the courtroom during Judge Nixon's trial (10 minutes, or by stipulation). Address is c/o National Law Journal, National Press Building, Suite 1183, Washington, D.C. 20045.

Betty Lou Watkins -- Ms. Watkins has been Judge Nixon's secretary since 1982. She can identify office records reflecting a telephone call from Bud Holmes to Judge Nixon on March 11, 1983, and can also testify concerning her review of press coverage of the Drew Fairchild case from 1980 to 1983 (10 minutes, or by stipulation). Address is: c/o Judge Walter L. Nixon's Chambers, P.O. Box 1900, Biloxi, MS 39533.

Reid Weingarten -- The lead prosecutor, Mr. Weingarten can testify concerning promises that he made to induce Wiley Fairchild and Bud Holmes to testify against Judge Nixon (30 minutes). Address is c/o Steptoe & Johnson, 1330 Connecticut Avenue, N.W., Washington, D.C. 20036.

Jack Weldy -- Formerly judge of the Forrest County Circuit Court, Judge Weldy can testify concerning his handling of the Drew Fairchild case and concerning his experience with the prosecutorial practices of Paul "Bud" Holmes (15 minutes). Address is 605 South 34th Avenue, Hattiesburg, MS 39401.

Glenn White -- Mr. Holmes' former assistant and now his successor as State's Attorney for Forrest County, Mr. White can testify concerning the handling of the Drew Fairchild criminal case (20 minutes). Address is State's Attorney, P.O. Box 866, Hattiesburg, MS 39401.

Character Witnesses -- We may decide to call several character witnesses. Such testimony ordinarily is brief, and we would not expect to call more than ten such witnesses. When we have identified those witnesses, we will provide prompt notice to the Senate and the House Managers (90 minutes, maximum).

B. Designation of Record Evidence

THE DREW FAIRCHILD CASE

1. Bill Porter of Hattiesburg, who represented Drew Fairchild in his criminal case, complained to Bud Holmes in the summer of 1981 that Drew had not paid his fee in full. To help Porter collect his fee, Holmes called U.S. Attorney George Phillips, who also is from Hattiesburg and asked him if he could take over Drew's prosecution. When Phillips agreed, Holmes indicted Drew in state court, and his primary motive for doing so was to help Porter collect his fee.

Trial Tr. 732-34, 843-46, 936 (Holmes)
House Tr.[2] 303 (Holmes) (7/8/88)

2. In December 1982, Bill Porter again complained to Bud Holmes about the Drew Fairchild case, this time complaining that Circuit Judge Jack Weldy was leaving office and would be replaced by Richard McKenzie, a political adversary of Porter's. In response to Porter's complaints, Holmes decided to pass Drew's case to the files.

Trial Tr. 754-55, 858-59 (Holmes)
House Ex. N-49
House Ex. N-48

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[2] House Tr. refers to the Hearing Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary on June 9-10, July 6-8, and 12, 1988, Serial No. 96, unless otherwise designated.

3. Passing Drew's case to the files was a legally meaningless act, which was reversed 33 days later when the case was restored to the active docket.

Trial Tr. 755, 924 (Holmes)
Trial Tr. 1853 (Reid Weingarten)

THE PHONE CALL FROM BUD HOLMES' FARM

4. After Drew's case was returned from the files, Judge Nixon happened to visit Wiley Fairchild in his office. Wiley complained that Bud Holmes and possibly Carroll Ingram were blackmailing him by dragging the good Fairchild name through the media.

Trial Tr. 481-84 (Wiley)
Trial Tr. 1532-35 (Nixon)

5. Wiley Fairchild did not ask Nixon to do anything for him.

Trial Tr. 640-41 (Wiley)
House Tr. 192, 209 (Wiley) (7/7/88)

6. At Bud Holmes' farm that evening, Holmes offered to tell Nixon about Drew's case, but Nixon stopped him from doing so.

House Tr. 246-47, 276 (Holmes) (7/7/88)
House Tr. 305 (Holmes) (7/8/88)

7. Holmes then placed a telephone call to Wiley Fairchild and gave Judge Nixon the telephone. Wiley told

Nixon that he was glad Nixon had mentioned that matter to Holmes and he was satisfied with the situation.

Trial Tr. 1541-42 (Nixon)

8. Both Wiley and Judge Nixon concluded from the phone call that the blackmailing accusation had been resolved. Neither recall any statement by Bud Holmes concerning passing Drew's case to the files.

Trial Tr. 663 (Wiley)
House Tr. 195, 210 (Wiley) (7/7/88)

9. Holmes did not think that Judge Nixon had attempted to influence him in connection with Drew Fairchild's case.

House Tr. 245, 280-81, 292-93 (Holmes) (7/7/88)

10. Neither Holmes nor Wiley Fairchild was sober during the phone call to Wiley from Holmes' farm.

House Tr. 179 (Wiley) (7/6/88)
House Tr. 334-35 (Holmes) (7/8/88)

11. Although Wiley Fairchild did tell Judge Nixon about his suspicion that Holmes was blackmailing him over Drew's case, Wiley did not consider that he had discussed Drew's case with Judge Nixon.

House Tr. 195 (Wiley) (7/7/88)

12. Although Carroll Ingram learned from Judge Nixon that the judge had conveyed some message from Wiley to Holmes concerning Drew Fairchild's case, Ingram did not consider that he had discussed Drew's case with Judge Nixon; neither did the lead prosecutor.

House Tr. 404-05 (Ingram) (7/8/88)
House Tr. 46-47 (Weingarten) (6/9/88)

THE INVESTIGATION

13. During the April 1984 interview of Judge Nixon, the federal investigator focused his attention on the question how Drew Fairchild's case was transferred from federal to state prosecutors.

Def. Trial Ex. 43A, pp. 28-29, 42-43, 46, 50

14. The publicity and leaks surrounding the Fairchild/Nixon investigation in the summer of 1984 were terrible, and prompted issuance of a gag order against leaks by federal investigators.

House Tr. 448-50, 453 (Judge Nixon) (7/12/88)
House Tr. 431-32 (Weingarten) (6/10/88)

15. Before they reached plea bargains with the government and changed their recollection, both Wiley and Holmes stated that Holmes placed the call to Wiley from Holmes' farm.

Post-Conviction Ex. 20
Post-Conviction Tr. 50 (Baltar)
House Tr. 404 (Ingram) (7/8/88)

CHANGING THE WITNESSES' TESTIMONY

(a) Wiley Fairchild

16. When Wiley Fairchild began plea negotiations with federal prosecutors in fall 1984, they told him that he had to give them a "smoking gun" on Judge Nixon. Wiley lay awake nights trying to come up with such a smoking gun.

House Tr. 187 (Wiley) (7/6/88)
House Tr. 193, 214 (Wiley) (7/7/88)
Post-Conviction Tr. 30 (Baltar)
Post-Conviction Tr. 193 (Wiley)

17. The lead prosecutor made the following promises to Wiley Fairchild in the course of plea bargaining with him and preparing Wiley to testify.

(a) To do what he could to help Drew in Drew's drug prosecution

Post-Conviction Tr. 202-03 (Wiley)
Post-Conviction Tr. 43-44 (Baltar)
Post-Conviction Tr. 427-28 (Weingarten)

(b) To help Wiley maintain his eligibility for federal contracting.

Post-Conviction Tr. 263-64 (Hess)
Post-Conviction Tr. 400 (Weingarten)

(c) To help drop the charges against Wiley if he became convinced there was no connection between Judge Nixon and Drew's case.

House Tr. 184 (Wiley) (7/6/88)
Post-Conviction Tr. 45-46 (Baltar)
Post-Conviction Tr. 250-51 (Hess)
Post-Conviction Tr. 378 (Weingarten)
Post-Conviction Tr. 203-04 (Wiley)

(d) To assist Wiley's application for an executive pardon.

House Tr. 187-88 (Wiley) (7/6/88)
House Tr. 50 (Weingarten) (6/9/88)
Post-Conviction Tr. 209-10 (Wiley)
Post-Conviction Tr. 70-72, 105-07 (Baltar)
Post-Conviction Tr. 378-80 (Weingarten)

18. In response to pressure from the prosecutor, Wiley changed his description of the events in this case on the following matters:

(a) The date of the phone call from Bud Holmes' farm, on which Wiley adopted the prosecutor's suggestion that the call occurred before Drew's case was passed to the files.

Post-Conviction Tr. 36-38, 48, 54 (Baltar)
Post-Conviction Tr. 214, 225-26 (Wiley)

(b) The date when Wiley and Carroll Ingram first talked about selling oil properties to Judge Nixon, on which Wiley adopted the prosecutor's suggestion that he conversation occurred after the drug bust at the Hattiesburg Airport in August 1980.

Post-Conviction Tr. 37, 47-48 (Baltar)
Post-Conviction Tr. 212-13, 215-16 (Wiley)

(c) Who placed the call, as Wiley changed his memory from Bud Holmes making the call to Nixon placing the call.

Post-Conviction Tr. 33, 50 (Baltar)
Post-Conviction Ex. 20 (FBI memorandum of interview with Wiley)

19. In early 1985, when the Mississippi state authorities refused to enforce Bud Holmes' plea bargain with Drew, the federal prosecutors intervened at Drew's lawyer's request and indicted Drew on federal charges to preempt the state prosecution and to protect Drew from a long term in state prison.

Post-Conviction Ex. 5

20. In plea bargaining with Drew, the federal prosecutors promised not to recommend any specific prison term at Drew's sentencing, and lived up to that promise at the sentencing.

Post-Conviction Tr. 269-70, 287-88 (Hess)
Post-Conviction Tr. 440 (Weingarten)

21. To make sure that Wiley gave the testimony the prosecutor wanted, the prosecutor encouraged John Baltar to prepare a chronology or "script" for Wiley to study. The prosecutor even gave Baltar a model for such a chronology in his own handwriting. The prosecutor's original notes were found in the records of Fairchild Construction Co.

Post-Conviction Ex. 23
Post-Conviction Tr. 51-55 (Baltar)
Post-Conviction Tr. 204 (Wiley)
Post-Conviction Tr. 433-36 (Weingarten)

22. Baltar, with assistance from the prosector, prepared the chronology and marked with yellow high-liner and arrows the points the prosecutor wanted covered. A copy of the Weingarten/Baltar script was found in the Justice Department's files.

Post-Conviction Ex. 18
Post-Conviction Tr. 50-55 (Baltar)
Post-Conviction Tr. 433-36 (Weingarten)

23. As late as spring of 1988, wiley was still trying to get the prosecutor to help him get an executive pardon.

Post-Conviction Tr. 102-03 (Baltar)
Post-Conviction 452-53 (Weingarten)

(b) Bud Holmes

24. In February 1985, Judge Nixon's lawyer confirmed to Holmes' attorney that Judge Nixon remembered the phone call from the farm to Wiley.

House Tr. 268 (Holmes) (7/7/88)

25. In early 1985, Bud Holmes personally pressured two witnesses, Carroll Ingram and Kate Matison, to give testimony favorable to him.

Trial Tr. 1091-93 (Ingram)
Trial Tr. 1348-58 (Matison)

26. The federal prosecutor told Holmes in March 1985 he did not have to be indicted if he would fill in the gaps of the investigations, which Holmes understood to mean that he had to come up with incriminating information about Judge Nixon.

House Ex. N-26
House Ex. N-27
House Tr. 291 (Holmes)
Trial Tr. 813-17 (Holmes)

27. The lead prosecutor believed, and told Bud Holmes, that the government probably could not convict Holmes on several of the charges in his indictment.

House Ex. N-26, ¶ 7.
House Ex. N-30, ¶ 7.

JUDGE NIXON'S PURCHASE OF OIL PROPERTIES

28. The verbal agreement for Judge Nixon to purchase oil property from Wiley Fairchild was reached in late 1979 or early 1980, about eight months before the drug bust at the Hattiesburg Airport that involved Drew Fairchild.

Trial Tr. 1036-37 (Carroll Ingram)
Post-Conviction Tr. 213 (Wiley Fairchild)
House Tr. 217-18 (Wiley Fairchild) (7/7/88)
House Tr. 341-42 (Ingram) (7/8/88)

29. Judge Nixon intended to make a loan to purchase oil properties from Wiley Fairchild, so when Fairchild offered To loan him the money, Judge Nixon borrowed the money from Fairchild at 10% interest.

Trial Ex. 19
Trial Tr. 1053-59 (Ingram)
House Tr. 355-57 (Ingram) (7/8/88)

30. Two of the three oil properties bought by Judge Nixon from Wiley Fairchild were successful, while the third was entirely unsuccessful.

Trial Ex. D-20, D-21

31. At about the same time he bought the oil interests from Fairchild, Judge Nixon made other oil and gas investments which he also financed through loans.

House Tr. 425-27 (Judge Nixon) (7/12/88)
House Ex. N-20.

32. Wiley Fairchild set the price and terms for the oil interests he sold to Judge Nixon, and Wiley made profits ranging from 1,300% to 8,000% on the royalty interests he sold to Judge Nixon.

House Ex. N-14
House Tr. 201 (Wiley) (7/7/88)

33. Judge Nixon recused himself from one case which involved Wiley Fairchild's oil interests, and from another case which involved a different investment by Judge Nixon.

Trial Tr. 1504-05 (Judge Nixon)
House Tr. 129-31, 135-37 (3/2/89) (and
unnumbered exhibit in Transcontinental)

34. Judge Nixon's purchase of oil properties from Wiley Fairchild was reported on his annual financial disclosure form for 1981 and thereafter, and was recorded in the public land records of Alabama and Mississippi.

Trial Ex. D-40, D-41
House Tr. 369-70 (Ingram) (7/8/88)

Respectfully submitted,

Boyce Holleman

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Date: August 2, 1989

IN THE SENATE OF THE UNITED STATES
Sitting as a Court of Impeachment

In re)
)
IMPEACHMENT OF)
WALTER L. NIXON, JR.)

THE HOUSE OF REPRESENTATIVES' OBJECTIONS CONCERNING AUTHENTICITY OF RESPONDENT'S "POTENTIAL EXHIBITS"

Pursuant to the Second Order of the Impeachment Trial Committee, the House of Representatives, through its Managers and counsel, submits this statement of objections as to the authenticity and genuineness of the "potential exhibits" listed by Respondent as part of his pre-trail statement.

The House at the present time is hopeful that there will be no objections at the time of trial to the exhibits that Respondent may seek to introduce. However, the House has not yet seen all of Respondent's exhibits. Given the description on Respondent's exhibit list, assuming that Respondent offers an accurate copy of the complete document, the House anticipates no objection to the authenticity of most of the listed exhibits.

However, pending review of the proposed exhibits, the House preserves its objections as to the authenticity of

Respondent's exhibits. At this time, the House's principal concerns are with Respondent's exhibit Nos. 50, 51, 52, 53, 54, 73, 76 and 77. These items were not admitted into evidence during either the criminal trial or the House impeachment proceedings. Moreover, these items--handwritten pages and a tape recording only recently provided to the House--are of the type traditionally posing problems of authenticity and genuineness. The House anticipates, but cannot yet be certain, that with the cooperation of counsel for Respondent all of its concerns about the authenticity of these exhibits will be alleviated prior to trial.

Respectfully submitted,

The United States
House of Representatives

By Alan I. Baron (PLK)
Alan I. Baron
Special Counsel

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Jack Brooks
Don Edwards
Benjamin L. Cardin
F. James Sensenbrenner
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House Judiciary Committee Staff
Participating in the Impeachment Proceedings

William Jones, General Counsel
Daniel Freeman, Counsel
Catherine A. LeRoy, Counsel
Colleen Kiko, Counsel

IN THE SENATE OF THE UNITED STATES
Sitting as a Court of Impeachment

In re)
)
IMPEACHMENT OF)
WALTER L. NIXON, JR.)

THE HOUSE OF REPRESENTATIVES' LIST OF "POTENTIAL EXHIBITS" THAT MIGHT BE INTRODUCED DURING CROSS OR REDIRECT EXAMINATION

At the request of counsel for Judge Nixon, and per the instructions of the Committee during the August 1, 1989 pre-trial conference, the House of Representatives submits this list of "potential" exhibits that it might seek to introduce, depending upon the testimony given, during cross-examination of Respondent's witness, or during re-direct examination of witnesses called to testify during the House's case-in-chief. Counsel for Respondent acknowledged during the pre-trial conference that he was not asking the House to include potential rebuttal exhibits.

The House has already filed its list of those exhibits it intends to introduce during its case-in-chief. Copies of those exhibits will be provided to the Committee and Respondent as directed in the Committee's Second Order.

The House's list of "potential" exhibits must be tentative at this time, since it is unclear exactly what exhibits Respondent will offer at trial, what witnesses he will call to testify, or what the testimony of the witnesses will be.

Among the exhibits that the House might seek to introduce during cross-examination of Respondent's witnesses, or re-direct examination of the House's witnesses, are the following:

1. Any exhibit introduced by the government or the defense during Judge Nixon's trial, post-trial and post-conviction proceedings.

2. Any exhibit introduced by either the House Subcommittee or Judge Nixon during the House impeachment proceedings in June and July, 1988, and March, 1989.

3. Any of the "potential" exhibits listed by Judge Nixon.

For purposes of brevity, and because these documents are well-known to Respondent, the House does not herein recite these exhibits.

In addition to the foregoing, the following may be considered "potential" exhibits that the House might seek to introduce during re-direct or cross-examination.

1. Telephone record reflecting call on December 1, 1982 from (601) 544-1154 to (601) 436-4317.

2. Deposition of Wiley Fairchild taken on December 13, 1988 in connection with House impeachment proceedings.

3. Grand jury testimony of Wiley Fairchild, July 19, 1984.

4. Grand jury testimony of Wiley Fairchild, November 28, 1984.

5. Grand jury testimony of Carroll Ingram, February 21, 1985.

6. May 7, 1984 FBI Memorandum re Wiley Fairchild.

7. May 4, 1984 FBI Memorandum of interview with Paul "Bud" Holmes.

8. May 8, 1984 FBI Memorandum of interview with Carrol Ingram.

9. Grand jury testimony of John Baltar, September 5, 1984.

10. October 30, 1984 FBI Memorandum of interview with John Baltar.

11. April 20, 1984 FBI Memorandum of interview with Drew Fairchild.

12. Grand jury testimony of Drew Fairchild, September 5, 1984.

13. Grand Jury testimony of Rodney Fairchild, September 5, 1984.

14. Grand Jury testimony of Karl Kepper, March 27, 1985.

15. Grand Jury testimony of William Dukes, July 30, 1985.

16. Grand Jury testimony of Richard McKenzie, September 5, 1984.

17. Grand Jury testimony of George Phillips, July 30, 1985.

18. Deposition of George Phillips, March 28, 1989.

19. February 13, 1986 FBI Memorandum of interview with Katie Matison.

20. April 24, 1984 FBI Memorandum of interview with Katie Matison.

21. April 25, 1984 FBI Memorandum of interview of Richard McKenzie.

22. November 6, 1984 FBI Memorandum of interview of Elma Manasco.

23. Grand Jury testimony of Robert Royals, September 5, 1984.

24. Deposition of Betty Lou Watkins, December 20, 1988.

25. Grand Jury testimony of Jack Weldy, September 5, 1984.

26. Grand Jury testimony of Glenn White, September 5, 1984.

27. Grand Jury testimony of Kenneth P. White-Spunner, August 18, 1985.

28. April 24, 1984 Memorandum of FBI interview of Glenn White.

29. Charge to Grand Jury by Judge Nixon, February 21, 1984.

Should the House learn of additional "potential" exhibits that it might seek to introduce during cross or redirect examination, notice will be provided to Respondent.

If and when the House determines with certainty that it will seek to introduce any document not included on its list of exhibits filed on July 31, 1989, it will so notify and provide copies to the Committee and Respondent.

Respectfully submitted,

The United States
House of Representatives

By Alan I. Baron (PSK)
Alan I. Baron
Special Counsel

Managers of the House of Representatives

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August 7, 1989

Peter Keith
Associate Special Counsel
U.S. House of Representatives
House Annex 2, Room 366
Washington, D.C. 20515

Re: Stipulations

Dear Mr. Keith:

I write to notify you that respondent Walter L. Nixon, Jr. is agreeable to stipulating to the accuracy of the following statements in "House of Representatives' Proposed Stipulation of Facts," previously filed with the Senate:

37, 47, 48, 51, 52, 53, 56, 58, 59, 60, 63, 64, 69, 78, 79, 99, 100, 104, 107, 109, 121, 134, 135.

By copy of this letter to Andrew Purdy of the Senate Impeachment Committee Staff, I am notifying the Senate of these further stipulations.

Very truly yours,

David O. Stewart

David Overlock Stewart

DOS/paa

cc: Andrew Purdy

IN THE SENATE OF THE UNITED STATES
Sitting As A Court Of Impeachment

In re)
IMPEACHMENT OF)
WALTER L. NIXON, JR.)

JUDGE NIXON'S SUPPLEMENTAL DESIGNATION OF RECORD EVIDENCE

In response to the Senate's second pretrial Order, and after conferring with staff concerning areas that should be addressed in this submission, Judge Nixon, through undersigned counsel, hereby identifies those record materials relating most directly to the two conversations among Judge Nixon, Wiley Fairchild and Bud Holmes in March 1983, that lie at the center of this case.

1. The two conversations occurred in March 1983, after Drew Fairchild's state-court prosecution had been passed to the files and returned from the files.

House Hearings, Vol. I, p. 433 (Judge Nixon)

Trial Tr. 1539-41 (Judge Nixon)

Post-Conviction Tr. 201-02, 214 (Wiley Fairchild)

Post-Conviction Tr. 37-39 (John Baltar, describing Wiley Fairchild's first description of these events, in fall, 1984)

SUPRECRD.NX

Post-Conviction Tr. 334-35 (proffer of Rodney Fairchild's testimony)

Respondent's Ex. 55 (Bud Holmes grand jury testimony of Feb. 21. 1985), p. 53 (placing phone call in spring of 1982 or 1983)

2. Judge Nixon visited Wiley Fairchild that afternoon as a social call, having recently paid off the notes Fairchild had held.

Trial Tr. 1530-31 (Judge Nixon)

House Hearings, Vol. I, p. 433 (Judge Nixon)

3. Wiley Fairchild complained to Judge Nixon that Bud Holmes -- and maybe Carroll Ingram -- was blackmailing him by dragging the Fairchild name through the media in the prosecution of Drew Fairchild.

Trial Tr. 481-84 (Wiley Fairchild)

Trial Tr. 1532-35 (Judge Nixon)

House Hearings, Vol. I, pp. 208-09 (Wiley Fairchild)

House Hearings, Vol. I, p. 434 (Judge Nixon)

4. Wiley Fairchild did not ask Nixon to do anything for him.

Trial Tr. 640-41 (Wiley Fairchild)

Trial Tr. 1535 (Judge Nixon)

House Hearings, Vol. I, p. 209 (Wiley Fairchild)

House Hearings, Vol. I, p. 434 (Judge Nixon)

5. Judge Nixon was not taken to Bud Holmes' office by Carroll Ingram that afternoon, and Judge Nixon and Carroll Ingram did not have a drink at Holmes' office then.

Trial Tr. 1154 (Carroll Ingram)

House Hearings, Vol. I, pp. 435, 473 (Judge Nixon)

6. While at Holmes' farm that evening, Judge Nixon mentioned Wiley Fairchild's blackmailing complaint.

Trial Tr. 1538-39 (Judge Nixon)

House Hearings, Vol. I, p. 436 (Judge Nixon)

7. In response, Holmes offered to tell Judge Nixon about Drew Fairchild's case, but Nixon stopped him from doing so.

Trial Tr. 1539 (Judge Nixon)

House Hearings, Vol. I. pp. 276, 305 (Bud Holmes)

8. Holmes then placed a telephone call to Wiley Fairchild.

Trial Tr. 1541-42 (Judge Nixon)

House Hearings, Vol. I, pp. 437-38 (Judge Nixon)

Post-Conviction Tr. 33, 50, 69 (Baltar, describing Wiley Fairchild's original recollection of who placed the call).

FBI Teletype, Nov. 2, 1984 (Post-Conviction Ex. P-20; Respondent's Ex. 36).

9. Holmes did not think that Judge Nixon had attempted to influence him in connection with Drew Fairchild's case.

House Hearings, Vol. I, pp. 245, 280-81, 292-93
(Bud Holmes)

10. Neither Holmes nor Wiley Fairchild was sober during the phone call to Wiley from Holmes' farm.

House Hearings, Vol. I, pp. 179 (Wiley Fairchild)

House Hearings, Vol. I, p 334-35 (Bud Holmes)

11. Although Wiley Fairchild did tell Judge Nixon about his suspicion that Holmes was blackmailing him over Drew's case, Wiley did not consider that he had discussed Drew's case with Judge Nixon.

House Hearings, Vol. I, p. 195 (Wiley Fairchild)

12. Although Carroll Ingram learned from Judge Nixon that the judge had conveyed some message from Wiley to Holmes concerning Drew Fairchild's case, Ingram did not consider that he had discussed Drew's case with Judge Nixon; neither did the lead prosecutor.

House Hearings, Vol. I, pp. 404-05 (Carroll Ingram)

House Hearings, Vol. I, pp. 46-47 (Reid Weingarten)

Respectfully submitted,

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Date: August 9, 1989

IN THE SENATE OF THE UNITED STATES
Sitting as a Court of Impeachment

In re)
)
IMPEACHMENT OF)
WALTER L. NIXON, JR.)

THE HOUSE OF REPRESENTATIVES' OBJECTIONS TO ANTICIPATED WITNESSES OR TESTIMONY

Pursuant to the instructions of the Impeachment Trial Committee at the August 1 Pre-trial Conference, the House of Representatives, through its Managers and counsel, submits the following objections to the proposed potential witnesses and proffered testimony submitted by Respondent, Judge Walter L. Nixon, Jr.

1. The House renews is objections to evidence concerning alleged prosecutorial misconduct, and incorporates herein by reference the reasons previously cited in the House's pre-trial Motion to strike Judge Nixon's affirmative defenses and to exclude evidence pertaining thereto. The purported claim of prosecutorial misconduct appears to be the basis for many of Respondent's "potential exhibits" and the testimony of proposed witnesses Baltar, Brennan, Dantin, Halsted, Hess, B. Holleman, M. Holleman, Kepper, Strasser and Weingarten.

2. The House objects to the proffered testimony of Boyce Holleman and Michael Holleman. These gentlemen are advocates and counsel for Judge Nixon in these proceedings, and should not appear as fact witnesses. See ABA Model Rules of Professional Conduct, Rule 3.7.

Moreover, Mr. Boyce Holleman's proffered testimony can serve no legitimate purpose. Wiley Fairchild will testify in person before the Committee, and the Senate will hear first hand whether Mr. Fairchild does, in fact, "recant" his trial testimony. Mr. Holleman should not be permitted to argue his client's cause under the guise of sworn testimony.

Respectfully submitted,

The United States
House of Representatives

By Alan I. Baron (PEK) 8/9/89
Alan I. Baron
Special Counsel

Managers of the House of Representatives

Jack Brooks	F. James Sensenbrenner
Don Edwards	William E. Dannemeyer
Benjamin L. Cardin	

Impeachment Trial Staff

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William Jones, General Counsel
Daniel Freeman, Counsel
Catherine A. LeRoy, Counsel
Colleen Kiko, Counsel

IN THE SENTATE OF THE UNITED STATES
Sitting as a Court of Impeachment

In re)
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IMPEACHMENT OF)
WALTER L. NIXON, JR.)

THE HOUSE OF REPRESENTATIVES' PRE-TRIAL SUMMARY OF FACTS AND ISSUES

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IN THE SENATE OF THE UNITED STATES
Sitting as a Court of Impeachment

In re)
)
IMPEACHMENT OF)
WALTER L. NIXON, JR.)

THE HOUSE OF REPRESENTATIVES' PRE-TRIAL SUMMARY OF FACTS AND ISSUES

Pursuant to the instructions of the Impeachment Trial Committee, the House of Representatives, by its Managers and counsel, submits the following summary of facts and issues, supported by citations to the prior record already admitted into evidence, to supplement its Pre-trial Statement filed with the Senate on July 31, 1989.

The House of Representatives designates the prior record cited herein as part of its presentation of evidence to the Senate. As set forth below, and as outlined previously in the House's Pre-Trial Statement, the evidence conclusively establishes that Judge Nixon is guilty of the charges set forth in the three Articles of Impeachment and should be removed from the bench.

References to the prior record are cited herein as follows:

1. Trial testimony -- Ingram Trial Tr. ___
2. House Subcommittee testimony of June-July, 1988

(printed in Serial No. 96) -- Ingram House Tr. ___
3. House Subcommittee testimony of March, 1989 (printed in Serial No. 3) -- Lubet House Tr. 3/2/89, ___
4. Post-conviction testimony of August, 1988 -- Fairchild P. C. Tr. ___
5. Exhibits from the House Subcommittee hearings of June-July, 1989 (printed in Serial No. 96, Appendix I) -- Subcomm. Ex. __, or Ex. N-__
6. Exhibits from the House Subcommittee hearing of March, 1989 -- Subcomm. Ex. __, 3/2/89

I. SUMMARY OF FACTS

A. Judge Nixon's Oil and Gas Investment with Wiley Fairchild

In February, 1979 Judge Nixon approached Carroll Ingram, who was a friend and a Hattiesburg, Mississippi, attorney who practiced before him. Feeling hampered by his judicial salary and hoping to generate additional income, Judge Nixon specifically asked Mr. Ingram about the possibility of making an oil investment with one of Mr. Ingram's clients, Hattiesburg construction and oil millionaire Wiley Fairchild (Ingram Trial Tr. 1020, 1026; Ingram House Tr. 340-343; Nixon House Tr. 420-421). Judge Nixon did not know Wiley Fairchild personally at the time (W. Fairchild Trial Tr. 492; Ingram Trial Tr. 1027; Nixon House Tr. 420).

Thereafter, Judge Nixon checked on Wiley Fairchild's reputation with several persons, including Paul H. "Bud" Holmes, District Attorney for Forrest County, Mississippi during 1980-1984 and a very close friend of Judge Nixon's for many years (Holmes House Tr. 227-228; Nixon House Tr. 421). Mr. Holmes told Judge Nixon that Wiley Fairchild had a reputation for getting close to influential people and that an oil investment with Mr. Fairchild would be "very, very safe," to the point that Mr. Fairchild would "pour oil down the hole" if necessary to make the investment profitable (Holmes Trial Tr. 727-728; Nixon Trial Tr. 1464-1465, 1468-1469, 1480; Holmes House Tr. 233; Nixon House Tr. 421).

In the spring of 1979, Judge Nixon attempted to contact Mr. Ingram to confirm the Judge's interest in investing with Wiley Fairchild. Judge Nixon called periodically to check if Mr. Ingram had discussed his request with Mr. Fairchild. Mr. Ingram felt "on the spot" about Judge Nixon's request and was reluctant to present the matter to Mr. Fairchild, to the point of avoiding the Judge's calls (Ingram Trial Tr. 1027-1029; Ingram House Tr. 345-346; Nixon House Tr. 422). However, Mr. Ingram ultimately approached Wiley Fairchild and asked him to put the Judge in an oil deal (W. Fairchild Trial Tr. 492, 545; W. Fairchild House Tr. 154; Ingram House Tr. 347).

Wiley Fairchild had previously helped a former governor of Mississippi and the Mayor of Hattiesburg with investments so as to have "friends" in public office, and saw Judge Nixon as an influential man who might be able to help him in the future (W. Fairchild Trial Tr. 468, 493-494, 537-539, 546; W. Fairchild House Tr. 144-145, 156). Wiley Fairchild never offered mineral interests to the general public. Rather, he purchased oil and gas leases and then developed wells and kept the profit. Judge Nixon knew Mr. Fairchild was not in the business of selling oil interests to the public at large (W. Fairchild Trial Tr. 494; W. Fairchild House Tr. 144; Nixon House Tr. 475).

Wiley Fairchild searched his portfolio for oil and gas wells that would benefit Judge Nixon (W. Fairchild Trial Tr. 494; W. Fairchild House Tr. 158). Mr. Fairchild finally agreed to convey to the Judge partial interests in three wells, two in Mississippi and one in Alabama. Wiley Fairchild selected the wells himself, without any discussion with Judge Nixon. Mr. Fairchild selected three wells that he felt would be profitable for the Judge. There was no negotiation over the price or the specific wells. Mr. Fairchild was free to pick the wells he wanted and picked three of his best wells (W. Fairchild Trial Tr. 494-495; W. Fairchild House Tr. 155, 159).

In the summer of 1979, Carroll Ingram told Judge Nixon that Wiley Fairchild would be "delighted" to put him in an investment. Judge Nixon contacted Mr. Ingram "a couple of times" thereafter to conclude the transaction, and was told by Mr. Ingram that Wiley Fairchild "is the kind of man you cannot push. He will take his own sweet time" (Nixon House Tr. 422-423).

In February or March of 1980, Judge Nixon met Wiley Fairchild for the first time at the office of W.R. Fairchild Construction Company in Hattiesburg. By the end of the meeting, according to Judge Nixon, the two men had reached an agreement to enter into the investment. There was no negotiation over the price or other terms of the investment (Nixon House Tr. 423-424).

Over the next year Judge Nixon telephoned Wiley Fairchild frequently, perhaps more than ten times (Nixon House Tr. 475-476). In late February 1981, Mr. Fairchild directed Robert L. ("Skip") Jarvis, an employee in his office, to draw up documents conveying royalty interests in the three wells Fairchild had chosen for Judge Nixon (Jarvis Trial Tr. 279-282; W. Fairchild House Tr. 162-163). Mr. Fairchild did not identify the grantee and told Mr. Jarvis to leave the grantee portion blank (Jarvis Trial Tr. 282). Mr. Jarvis completed an initial draft of the conveyances and forwarded them to Carroll Ingram for review. Mr. Ingram returned the draft documents to Wiley Fairchild (Jarvis Trial Tr. 285; Ingram Trial Tr. 1040; Ingram House Tr. 365; Subcomm. Ex. 3). Mr. Fairchild then instructed Mr. Jarvis to revise the draft documents by tripling the acreage to be sold to Judge Nixon and by backdating the documents a year (Jarvis Trial Tr. 286-288). During the first week of March, 1981, Mr. Jarvis prepared new documents with increased acreage, backdated to February 25, 1980 (Jarvis Trial Tr. 292; Subcomm. Ex. 4).

By February 1981, when the documents were backdated, Wiley's son Drew had been identified by federal authorities as a co-conspirator in a major marijuana smuggling effort at the Hattiesburg Airport (Phillips Trial Tr. 215-216; Weingarten House Tr. 8). The federal investigation leading to Judge Nixon's perjury convictions sought to determine whether the backdating was part of an effort to cover up a bribe of the Judge in return for assistance in Drew Fairchild's drug troubles. (Subcomm. Ex. 22 and 23).

Judge Nixon claims that the deeds were backdated to conform to the approximate date of the "gentleman's agreement," i.e. when Wiley Fairchild first agreed to sell the interests to Judge Nixon (Nixon House Tr. 425). However, Judge Nixon's position concerning the effective date of his agreement with Wiley Fairchild is inconsistent with the Judge's repayment of the debt he owed to Fairchild Construction Company as part of the transaction. It was only in 1984, after Judge Nixon was aware that federal authorities were investigating the transaction and more than a year after he had fully repaid all principal and other interest owed to Fairchild Construction, that Judge Nixon paid Fairchild Construction backdated interest for the period 1980-1981 (Subcomm. Ex. 11).

Nor are Judge Nixon's annual Judicial Financial Disclosure Reports consistent with his testimony concerning the effective date of his investment. On the one hand, Judge Nixon claims that the agreement was effective in 1980. Yet he failed to report the transaction on his 1980 Financial Disclosure Report and belatedly paid the interest. The transaction was reported for the first time on Judge Nixon's 1981 Financial Disclosure Report, but only in an amended report. Judge Nixon's original 1981 report failed to mention the Fairchild transaction and was returned to him as inadequate (Subcomm. Ex. 26; Subcomm. Ex. 13, 3/2/89).

The deeds ultimately executed by Wiley Fairchild and Judge Nixon state that the conveyances were not effective until the date the wells began production (Subcomm. Ex. 3). The language of the conveyances suggests that if the wells failed to produce, Judge Nixon may have had no obligation to pay for the investment.

The investment with Mr. Fairchild was not available to the general public, and, moreover, was provided to Judge Nixon on highly favorable terms. Judge Nixon did not have to pay any money "up front" to finance the purchase of the mineral interests. Instead, Fairchild Construction Company loaned Judge Nixon the total purchase price of $9,500 (Ingram Trial Tr. 1053-1055; W. Fairchild House Tr. 157). As part of the loan Judge Nixon executed three promissory notes. The notes were signed by Judge Nixon in February 1981, even though they are dated February 1980 (Subcomm. Ex. 5).

Conflicting testimony was presented at Judge Nixon's trial as to the value of the mineral interests. Wiley Fairchild estimated the three mineral interests to be worth from $25,000-28,000 as of both the date he selected the wells and the date when the conveyances were finally prepared, although he testified the interests were worth less in the spring of 1980 because the wells were further from production and less was known about their potential. In return for the conveyances, Wiley Fairchild wanted Judge Nixon to pay "something where it won't look like a hundred percent gift" (W. Fairchild Trial Tr. 506, 687; W. Fairchild House Tr. 168, 199-200).

Wiley Fairchild admitted he sold Judge Nixon interests that were "undervalued", and pled guilty to the crime of giving the Judge an illegal gratuity (W. Fairchild Trial Tr. 687; W. Fairchild House Tr. 183-184; Subcomm. Ex. 25). An oil expert familiar with the wells testified on behalf of the government at Judge Nixon's trial that the mineral interests conveyed to the Judge were worth over $53,000 on February 25, 1981, and about $21,000 in February 1980 (Jackson Trial Tr. 1391-1393). In contrast, an expert called by Judge Nixon at trial testified that the $9500 price paid by Judge Nixon was fair market value for the mineral interests he received (Massey Trial Tr. 1391-1393). But Wiley Fairchild confirms that he received less from Judge Nixon than what he could have obtained had he sold the interests on the open market (W. Fairchild House Tr. 168).

Mr. Fairchild selected good wells for Judge Nixon, increased the acreage conveyed, sold the interests for a price less than he could have received on the open market, and provided favorable financing to Judge Nixon. In

February 1981, at the same time Judge Nixon received the documentation for the Fairchild transaction, the Judge was also entering into oil investments with other parties (Nixon House Tr. 426-427). In order to do so he borrowed $10,000 at 15% interest, the going market rate, repayable within 90 days, from The Mississippi Bank (Subcomm. Ex. 12, 3/2/89). At this same time, however, Fairchild Construction Company provided Judge Nixon with a $9,500 unsecured loan at only 10% interest, repayable over 3 years (Subcomm. Ex. 5).

Wiley Fairchild met again with Judge Nixon in the late spring of 1981 after the mineral deeds had been delivered to the Judge by Mr. Ingram (W. Fairchild Trial Tr. 517; Ingram Trial Tr. 1067; Nixon House Tr. 430). On this occasion, Judge Nixon told Mr. Fairchild of his desire to generate additional income because of the anticipated expense of putting his children through college. Judge Nixon has acknowledged that at the meeting, he thanked Mr. Fairchild for "putting him in a deal" and told him, ". . . if I can ever help you, I will and if I can't, I'll just tell you I can't." Judge Nixon was admittedly grateful for the lucrative investment opportunity (W. Fairchild Trial Tr. 518; Nixon Trial Tr. 1513, 1656-1657; W. Fairchild House Tr. 176; Nixon House Tr. 430).

Judge Nixon began receiving royalty checks from Fairchild Construction Company in February 1982 (Jarvis Trial Tr. 295; W. Fairchild Trial Tr. 509; Subcomm. Exs. 9 and 11). By the date of his criminal trial in early 1986, Judge Nixon had received over $60,000 from the three wells, which were expected to produce for another 12 to 20 years (W. Fairchild Trial Tr. 513). By January 24, 1989, Judge Nixon had received over $73,000 from the Fairchild investment, and continues to receive regular income from the investment (Subcomm. Ex. 15, 3/2/89). Judge Nixon paid back the $9,500 notes with interest, but only after receiving royalty payments from Fairchild Construction Company in greater amounts so that he was never out-of-pocket (Jarvis Trial Tr. 365-366; Subcomm. Ex. 11).

Judge Nixon repaid much of his $9500 obligation to Fairchild Construction Company in advance of when payments were actually due (Subcomm. Exs. 5 and 11). In his Congressional testimony, Judge Nixon claimed he pre-paid his debt to Mr. Fairchild so as to "save on the interest" (Nixon House Tr. 431). Yet during the relevant time period Judge Nixon was equally indebted to banks at 15% interest, and had also borrowed approximately $10,000 on a personal line of credit at 18% interest (Subcomm. Ex. 12, 3/2/89). From the standpoint of "saving on the interest," it made little sense for the Judge to pre-pay a 10% debt even as he paid interest on loans at 15% and 18%. One can only conclude that Judge Nixon's prompt repayment to Mr. Fairchild was at least in part motivated by the Judge's desire to enhance his relationship with Mr. Fairchild.

Indeed, Judge Nixon sought to become involved in additional mineral transactions with Wiley Fairchild. In the fall of 1982 the two men discussed the possibility of another investment (W. Fairchild Trial Tr. 603-605; Nixon House Tr. 432). Wiley Fairchild testified that he considered putting Judge Nixon into a "Board of Education" well in Simpson County, Mississippi and mentioned the deal to the Judge, but did not put the Judge into the deal because the well "turned out to be no good" (W. Fairchild Trial Tr. 519; Nixon Trial Tr. 1523; W. Fairchild House Tr. 176).

B. The Drew Fairchild Drug Smuggling Case

On August 4, 1980, an airplane with 2,200 pounds of marijuana was seized by federal and local drug enforcement agents at the Hattiesburg Municipal Airport (D. Fairchild Trial Tr. 111; Phillips Trial Tr. 213; Weingarten House Tr.

7). Arrests were made at the scene and on August 19, 1980 an indictment was returned in federal court against three of the smugglers. Drew Fairchild, Wiley Fairchild's 50 year-old son, was a participant in the smuggling conspiracy but was not prosecuted at that time (Phillips Trial Tr. 214-215; Weingarten House Tr. 8; Subcomm. Ex. 1).

Shortly after the indictment of the smugglers, Drew Fairchild and his lawyer, Bill Porter, approached Forrest County District Attorney Paul H. "Bud" Holmes to discuss Drew's legal situation (D. Fairchild Trial Tr. 139-141; Holmes Trial Tr. 786-787; Holmes House Tr. 235-236). Mr. Holmes sent them to George Phillips, United States Attorney for the Southern District of Mississippi, who was overseeing the federal prosecution of the drug case (D. Fairchild Trial Tr. 141-142; Holmes Trial Tr. 730-731, 787; Holmes House Tr. 236). As a result of discussions with the U.S. Attorney's office, on November 19, 1980 Drew Fairchild entered into a "Memorandum of Understanding" under which he agreed to plead guilty to felony charges, pay a $15,000 fine, and receive a sentence of 5 years probation in return for cooperating with the government in the drug case (D. Fairchild Trial Tr. 114-115; PHillips Trial Tr. 217; Weingarten House Tr. 8; Subcomm. Ex. 2). Drew Fairchild was subsequently debriefed by agents working with the U.S. Attorney's office, who concluded that Drew was not being completely cooperative. The U.S. Attorney's office determined, therefore, that Drew Fairchild would be prosecuted for his involvement in the drug smuggling conspiracy (D. Fairchild Trial Tr. 148-149; Phillips Trial Tr. 219-220, 238; Weingarten House Tr. 8).

In March, 1981 Bill Porter sued Drew Fairchild to collect a $10,000 legal fee in connection with his representation of Drew in the drug case (D. Fairchild Trial Tr. 151; Subcomm. Ex. N-2). Approximately one quarter of the fee was paid by Wiley Fairchild on July 3, 1981, but Mr. Porter complained to Bud Holmes about his inability to collect the full fee from Drew (D. Fairchild Trial Tr. 154-155; W. Fairchild Trial Tr. 475; Holmes Trial Tr. 838; W. Fairchild House Tr. 150; Defense Trial Ex. 2). Mr. Holmes thereafter called U.S. Attorney Phillips and discussed the status of Drew's case. Mr. Holmes offered to take over the case and indict Drew Fairchild on state drug charges. Mr. Phillips agreed to transfer the case. Mr. Holmes assumed control over Drew's case both to carry out his law enforcement duties and to help his friend Bill Porter collect the full fee (Holmes Trial Tr. 732-34, 835-844; Phillips Trial Tr. 220-221; Holmes House Tr. 237).

On August 26, 1981 the Forrest County grand jury returned an indictment against Drew Fairchild and Robert

Watkins, the pilot in the drug-smuggling conspiracy (D. Fairchild Trial Tr. 116, 156; Holmes Trial Tr. 846-847; Holmes House Tr. 239; Subcomm. Ex. 7). Mr. Watkins was then a fugitive. Drew Fairchild was arraigned on September 3, 1981 with his attorney, Bill Porter, present (Govt. Trial Ex. 6). Mr. Porter demanded the remainder of his $10,000 fee "up front." In order to obtain the money, Wiley Fairchild made his son Drew turn over numerous oil leases owned by Drew. Wiley Fairchild then paid Mr. Porter the remainder of the fee (D. Fairchild Trial Tr. 157-163; W. Fairchild Trial Tr. 477, 614-615; W. Fairchild House Tr. 206; Subcomm. Ex. 6).

In December, 1981 Robert Watkins was apprehended in Texas. This spurred negotiations between Drew Fairchild, his counsel and District Attorney Holmes. Drew Fairchild entered a guilty plea to the state charges on January 12, 1982 (D. Fairchild Trial Tr. 118, 166; Holmes Trial Tr. 735; Holmes House Tr. 240-241; Subcomm. Ex. 8). Messrs. Holmes and Porter orally agreed that if Drew cooperated against Robert Watkins, Drew would receive five years probation and a $5,000 fine, with sentencing to occur after the prosecution of Mr. Watkins was completed (Holmes House Tr. 240-241). Wiley Fairchild believed that with this plea agreement and his fee payment to Mr. Porter, he would be troubled no more by his son's case (W. Fairchild Trial Tr. 474-476, 479, 623, 624).

Drew Fairchild's sentencing was scheduled for March 19, 1982, but was delayed due to his back surgery. In May 1982 Robert Watkins failed to appear at a scheduled hearing and his bond was revoked. Drew Fairchild's case was continued through the summer of 1982. In October 1982 Mr. Watkins was apprehended in Florida, and extradition proceedings began. Drew's sentencing was continued again in November 1982 because Mr. Watkins had been apprehended (D. Fairchild Trial Tr. 118, 168, 171; Weingarten House Tr. 9; Holmes House Tr. 242-243; Subcomm. Ex. N-1 (A-E)).

On December 23, 1982, pursuant to a motion prepared at the direction of Bud Holmes, Drew Fairchild's drug case was "passed to the file" (Subcomm. Ex. 18). As a matter of local practice, this meant that Drew's case was put on the inactive list, an unprecedented disposition for a defendant who had pled guilty (Weldy Trial Tr. 1305; Holmes House Tr. 255). By passing the case to the files, District Attorney Holmes intended to "sweep the case under the rug" such that Drew would not even have to pay the fine or serve probation as contemplated under the plea agreement (Holmes House Tr. 247-248). Drew and Wiley Fairchild were extremely pleased with the passing of the case to the file and believed that

Drew's legal problems were finally at an end. This disposition of the case was not requested nor even anticipated by Drew (D. Fairchild Trial Tr. 120-121, 174-176; W. Fairchild Trial Tr. 629-631; W. Fairchild House Tr. 153, 180; Holmes House Tr. 248). Indeed, Drew's attorney, Bill Porter, had asked Bud Holmes to carry out the plea agreement and have Drew sentenced before a particular judge who was presiding over the case left the bench (Holmes House Tr. 259).

District Attorney Holmes repeatedly testified, both at trial and before the Subcommittee, that a primary reason for sweeping the Drew Fairchild case "under the rug" was a meeting between Mr. Holmes and Judge Nixon at Mr. Holmes' farm and a telephone call that same evening involving Judge Nixon, Bud Holmes and Wiley Fairchild concerning Drew's case (Holmes Trial Tr. 751-754, 938-944; Holmes House Tr. 253). Bud Holmes verified that had it not been for Judge Nixon's involvement, the Drew Fairchild case would never have been passed to the files (Holmes House Tr. 253).

In early January, 1983 Forrest County Circuit Court Judge Dickie McKenzie took office after defeating the incumbent, Judge Jack Weldy, in an election (McKenzie Trial Tr. 1310). Judge McKenzie observed that the Drew Fairchild case had been passed to the file, expressed his concern about what had occurred, and the matter was reported in the local news media (McKenzie Trial Tr. 1310-1318; Holmes House Tr. 258). Robert Watkins was returned to Hattiesburg and arraigned on January 26, 1983. On that same date, only one month after passing the case to the files, Mr. Holmes reinstated Drew's case to the active docket. In the motion to reinstate the case, Mr. Holmes stated that Mr. Watkins' return to Mississippi justified reactivation of Drew's case (McKenzie Trial Tr. 1314-1315; Holmes Trial Tr. 755; Holmes House Tr. 258; Subcomm. Ex. 19). However, Mr. Holmes testified that he reinstated the case because of negative publicity resulting from the passing of the case to the file (Holmes House Tr. 258).

C. Judge Nixon's Involvement in Drew Fairchild's Case

Drew Fairchild's drug prosecution was a source of embarrassment and humiliation to Wiley Fairchild, who was concerned about his family's reputation (W. Fairchild Trial Tr. 474-479). In addition, Wiley Fairchild felt he was being extorted in connection with his son's case because of the treatment of Robert Royals, Drew's co-manager at the airport and a participant in the smuggling conspiracy (W.

Fairchild Trial Tr. 479; W. Fairchild House Tr. 176-177). Unlike Drew Fairchild, Royals had not been prosecuted by federal or state authorities. Mr. Royals told Wiley Fairchild that Bill Porter had said Wiley should "get off his money" to help Drew, who had his "tail in a crack" (W. Fairchild Trial Tr. 480, 621-623; W. Fairchild House Tr. 177, 205-206).

Convinced that Bud Holmes and possibly others were blackmailing him in connection with his son's case, Wiley Fairchild sought help from Judge Nixon. Mr. Fairchild testified that he telephoned Judge Nixon and, when the Judge was unavailable, left a message asking the Judge to stop by the W. R. Fairchild Construction Company office in Hattiesburg (W. Fairchild Trial Tr. 481-483; W. Fairchild House Tr. 177). Wiley Fairchild specifically wanted Mr. Holmes to take care of his son's case as promised, and sought out Judge Nixon because of the Judge's previous offer of help--". . . if I can ever help you I will and if I can't, I'll just tell you I can't"--and because he knew Judge Nixon and Mr. Holmes were very good friends (W. Fairchild Trial Tr. 481-482; W. Fairchild House Tr. 177-178).

Judge Nixon visited Wiley Fairchild's office in Hattiesburg for a fifteen or twenty-minute meeting. At the meeting, Wiley Fairchild told the Judge he was being blackmailed by Mr. Holmes and possibly Carroll Ingram concerning the handling of Drew's drug case (W. Fairchild Trial Tr. 484; W. Fairchild House Tr. 177-178; Nixon House Tr. 433-434). Mr. Fairchild emphasized the unfairness of his son's predicament compared to the treatment of Robert Royals. Wiley Fairchild told Judge Nixon, "...if they will go ahead and prosecute Bob Royals they won't hear a damn word out of me. He's guilty and my son's guilty, but I just don't like them picking on my son because I got money" (W. Fairchild Trial Tr. 480-482, 484, 640-643; W. Fairchild House Tr. 177-178). Wiley Fairchild has repeatedly testified that his meeting with Judge Nixon occurred before his son's case was passed to the files (W. Fairchild Trial Tr. 481-483, 486, 660-661, 667, 670-672, 718-719).

Judge Nixon went to Bud Holmes' office shortly after hearing of Wiley Fairchild's complaints of blackmail in connection with Drew's case. Mr. Holmes believes that this occurred on May 14, 1982. Mr. Holmes bases his recollection upon unrelated events, particularly a wedding ceremony he attended in Jackson, Mississippi the following day (Holmes Trial Tr. 737, 874, 877, 883, 900, 906, 908, 947; Holmes House Tr. 255-256). A marriage certificate corroborates Mr. Holmes' recollection of May 14, 1982 as the probable date (Subcomm. Ex. 15). Mr. Holmes has repeatedly stated that his meeting with Judge Nixon could well have been another date (Holmes Trial Tr. 876-877; Holmes House Tr. 301-302). Visitor logs from the Forrest County District Attorney's office reflect Judge Nixon's presence at Mr. Holmes' office on May 13, 1982, as well as June 24, July 16, and October 20 of that year (Holmes Trial Tr. 751; Subcomm. Ex. 20).

According to Mr. Holmes, he and Judge Nixon had a couple of drinks at the District Attorney's office and then drove to Mr. Holmes' farm outside Hattiesburg (Holmes Trial Tr. 736, 742-748; Holmes House Tr. 244). Mr. Holmes testified that during the drive Judge Nixon said that Wiley Fairchild had asked him [Judge Nixon] to "put in a good word" for Drew Fairchild (Holmes Trial Tr. 736-737). Mr. Holmes testified that Judge Nixon expressly said he did not want Mr. Holmes to do anything wrong, embarrassing, or against his oath of office, but that he [Nixon] was "just saying that Mr. Fairchild asked me to put in a good word" (Holmes Trial Tr. 736-737). According to Bud Holmes, Judge Nixon also mentioned that he and Wiley Fairchild were discussing more oil and gas investments (Holmes Trial Tr. 736-737, 744-745, 920; Holmes House Tr. 246). Mr. Holmes testified that he believed Judge Nixon was trying to "ingratiate" himself with Wiley Fairchild (Holmes House Tr. 251-252).

Mr. Holmes testified that he reacted to these statements from his friend Judge Nixon by asking, "What is it you want? You want an apology? I don't know. What does the man want?" When Judge Nixon reiterated that he was simply "putting in a good word" and not asking Mr. Holmes to do anything, Mr. Holmes responded, "... hell, I'm District Attorney, I'll pass it to the files." Judge Nixon then told him, "...I'm not asking you to do that. Now I'm not asking you to do anything now" (Holmes Trial Tr. 736-738; Holmes House Tr. 246-247).

Bud Holmes testified that after they arrived at the farm, he and Judge Nixon continued to talk about the Drew Fairchild case. Mr. Holmes told Judge Nixon about the oral plea agreement already negotiated with Bill Porter, calling for probation and a fine in exchange for Drew's cooperation. Mr. Holmes testified that after hearing the terms of Drew's plea arrangement, Judge Nixon asked if Wiley Fairchild knew of the deal, and said he wished to telephone Mr. Fairchild and tell him about the arrangement. Mr. Holmes testified that Judge Nixon then telephoned Wiley Fairchild (Holmes Trial Tr. 739; Holmes House Tr. 246, 249).

Wiley Fairchild confirmed that he received a telephone call from Judge Nixon around seven o'clock one night (W. Fairchild Trial Tr. 485; W. Fairchild House Tr. 178-179). Mr. Fairchild had been drinking that evening but remembers the call because it was "so important" (W. Fairchild Trial Tr. 649-650; W. Fairchild House Tr. 179). Mr. Fairchild testified that Judge Nixon said, "Wiley, you know that man we was talking to this evening?... I'm in his house, and everything (is) going to be taken care of to your satisfaction." Thereafter, according to Mr. Fairchild, Bud Holmes got on the line and said, "Wiley, when this man asks me to do something, I don't ask no questions, I just go ahead and do it" (W. Fairchild Trial Tr. 485, 650; W. Fairchild House Tr. 178-179, 306).

In his trial testimony Wiley Fairchild specifically recalled that Judge Nixon was on the phone first (W. Fairchild Trial Tr. 529, 649). Mr. Fairchild testified that this call made him very happy because it meant that his son's case was "done away with once and for all" (W. Fairchild Trial Tr. 489). The next thing he recalled happening relating to his son's case was that it was passed to the file (W. Fairchild Trial Tr. 486; W. Fairchild House Tr. 180).

Mr. Holmes' recollection of the phone call in his trial testimony was similar to Wiley Fairchild's -- that Judge Nixon placed the call and told Mr. Fairchild, "I'm out at his farm and he tells me your son isn't going to jail, and I just wanted to call and tell you that" (Holmes Trial Tr. 739-740, 929-930; Holmes House Tr. 249). According to Mr. Holmes, Judge Nixon then went on to thank Wiley Fairchild for the profitable oil investment opportunity. Mr. Holmes testified that he then took the phone and told Mr. Fairchild he would pass the case to the file, adding that Judge Nixon should get the credit for helping Drew (Holmes Trial Tr. 740, 933; Holmes House Tr. 249-250).

Carroll Ingram learned of Judge Nixon's conversations with Bud Holmes and Wiley Fairchild concerning the Drew Fairchild case from all three participants--Wiley Fairchild, Bud Holmes and Judge Nixon himself (Ingram Trial Tr. 1068, 1070, 1075; Ingram House Tr. 374-375). Mr. Ingram testified that in the fall of 1982, Wiley Fairchild told him that he (Fairchild) had asked Judge Nixon to talk to Bud Holmes about Drew's case, that Judge Nixon had talked to Mr. Holmes and that the results were "positive" such that "Drew Fairchild's case was going to be okay" (Ingram Trial Tr. 1068, 1155; Ingram House Tr. 375).

Mr. Ingram testified that Judge Nixon told him that he (Nixon) had talked to Bud Holmes about the Drew Fairchild case because Wiley Fairchild had asked him to do so (Ingram Trial Tr. 1070, 1145, 1188-1190; Ingram House Tr. 375). Judge Nixon told Mr. Ingram that Mr. Holmes said he would consider this request and that Drew's case "was okay, that there was not anything going to happen in Drew Fairchild's case" (Ingram Trial Tr. 1190). Mr. Ingram's conversation with Judge Nixon occurred at about the same time Judge Nixon and Wiley Fairchild were discussing additional mineral transactions, and Mr. Ingram believed that Judge Nixon wanted to be in a position to participate in other investments with Mr. Fairchild (Ingram Trial Tr. 1071-1072). Corroborating Bud Holmes, and based upon his conversation with Judge Nixon, Mr. Ingram confirmed that Judge Nixon had "put in a good word" for Drew Fairchild (Ingram House Tr. 388, 412). Mr. Ingram also testified that during the federal investigation, Bud Holmes told him about the telephone call and asked Mr. Ingram if Wiley regularly taped his phone calls (Ingram House Tr. 378).

Following his meeting with Judge Nixon and the telephone call to Wiley Fairchild from the farm, District Attorney Holmes let Drew Fairchild's case "just sit" until he passed the case to the file in late 1982 at the end of

Judge Weldy's term (Holmes Trial Tr. 751; Holmes House Tr. 253). Mr. Holmes told the Subcommittee that he planned on sweeping Drew's case "under the rug" in part because of his discussion with Judge Nixon and promise to Wiley Fairchild (Holmes House Tr. 255). Mr. Holmes testified that while Judge Nixon did not specifically ask him to pass the case to the file, the Judge's "putting in a good word for Drew ... caused enough influence on me to go ahead and do what I did" (Holmes Trial Tr. 751-754, 938-944). Mr. Holmes repeatedly stated that but for Judge Nixon's intervention he would not have passed the case to the file in December 1982 (Holmes House Tr. 253, 275, 311).

The significance of Judge Nixon's involvement was highlighted by the testimony of other witnesses at Judge Nixon's trial. Glen White, who is presently Forrest County District Attorney and previously served as Mr. Holmes' assistant, was familiar with Drew's case and prepared the actual order signed on December 23, 1982 passing the case to the file. Mr. White testified that the reasons cited by Mr. Holmes in the order passing the Fairchild case to the file were inaccurate (White Trial Tr. 1277-1280). Judge Weldy, who signed the order, testified that he knew of no other instance when a case had been passed to the file after a guilty plea (Weldy Trial Tr. 1305).

D. The FBI/Department of Justice Interview of Judge Nixon on April 19, 1984

On November 3, 1983 an anonymous caller telephoned the Federal Bureau of Investigation claiming there was an improper relationship between Wiley Fairchild and Judge Nixon. The caller suggested that Wiley Fairchild may have conveyed mineral interests to Judge Nixon as a bribe for favorable treatment in Drew Fairchild's drug case. The caller advised the FBI that the mineral interests had been backdated so as to make it appear as if the transfer had taken place before Drew Fairchild's drug case. He also claimed that the notes to be repaid by Judge Nixon were not prepared in the normal course of business, but appeared only after Wiley Fairchild had been challenged by one of his employees on his relationship with Judge Nixon. The informant ultimately came forward and identified himself as Robert Jarvis, a former employee of Wiley Fairchild and presently an Assistant State's Attorney in Florida (Jarvis Trial Tr. 296-298, 300, 306-308, 315-319, 340, 347, 357-358).

During the subsequent investigation conducted by the FBI and the Public Integrity Section of the Department of Justice, Mr. Jarvis recorded a meeting with Wiley

Fairchild, in which Mr. Fairchild maintained that there was nothing illicit about his relationship with Judge Nixon but admitted that "certainly I'd rather do something for a judge or a prosecuting attorney. No, a judge. I'd rather do something for them than the average fellow. Because they're the ones who can help you if you ever need it" (Defense Trial Ex. 17A, p. 31).

As part of the investigation, a lawyer from the Department of Justice and an FBI agent interviewed Judge Nixon in his chambers in Biloxi, Mississippi on April 19, 1984. The interview was tape-recorded with the Judge's full consent. Judge Nixon was advised prior to and during the interview that the investigation was examining Judge Nixon's investment with Wiley Fairchild and the unusual handling of the Drew Fairchild case (Subcomm. Ex. 22). Unfortunately, during the interview Judge Nixon failed to tell the truth but instead denied, at several times and in the broadest possible terms, any knowledge of or participation in Drew Fairchild's case:

> Q. Did he [Wiley Fairchild] have anything on his mind that he wanted with you -
>
> Judge Nixon: You'd have to ask him because he's never asked --
>
> Q. I mean, did --

Judge Nixon: Anything that or demanded anything. Of course, anything to do with his [Fairchild's] son's case absolutely had nothing whatsoever, 'cause I don't, I'm not even aware of really what that's about. I think I read something in the paper one time about it since then.

Q. Did you --

Judge Nixon: But if you can --

Q. Detect anything --

Judge Nixon: If you can detect or know of anything at all where I ever had any connection with his son's case or the disposition of it or handling of it or anything to do with it, I sure wish you'd tell me, and I'll --

Q. I, well, I --

Judge Nixon: Because there has --

Q. I can assure you, we have no information to that effect --

Judge Nixon: There has, because there has been nothing.

Q. No, I, I guess what I'm asking you is whether or not you detected anything untoward from either --

Judge Nixon: Abso --

Q. Mr. Fairchild --

Judge Nixon: Absolutely not. If I had, I'da pulled back immediately and wouldn't have had a darn thing to do with it.

(Subcomm. Ex. 22, p. 19-20)

* * * * *

Q. From the time of that bust until ba-basically me talking to you about the case --

Judge Nixon: Uh-huh --

Q. You've had no connection, no knowledge of it, no participation in --

Judge Nixon: Correct --

Q. The Drew Fairchild case?

Judge Nixon: Absolutely, except something I read in the paper. It was either an editorial or state, or, or news article or something, a few years ago, I think -

(Subcomm. Ex. 22, p. 31)

* * * * *

Q. Do you recall any knowledge of the case, meaning the Fairchild case, while you were dealing with Wiley Fairchild?

Judge Nixon: No.

Q. And he certainly never brought it up?

Judge Nixon: Not to my recollection. I think I would recall that.

(Subcomm. Ex. 22, p. 32)

* * * * *

Q. Does he [Drew Fairchild] work with his father?

Judge Nixon: I have no idea. Didn't even know he existed, except from what I read about that and what you just told me. Absolutely no.

(Subcomm. Ex. 22, p. 33)

* * * * *

Q. I mean, I, our earnest desire is to wrap this end of it --

Judge Nixon: I understand --

Q. Completely, and often times judges are victimized by others --

Judge Nixon: Yeah, well, I don't --

Q. I mean, you're a savvy guy. You know that this happens.

Judge Nixon: Well, I don't know about that part of it, but all I know is ah nothing was done or nothing was ever mentioned about Wiley Fairchild's son, and I defy anybody to, and I say defy, I don't mean (unintelligible), but I challenge anybody to show any connection or anything I've ever done in connection with Wiley Fairchild's son's case I certainly would (unintelligible) to begin with. And if I even suspected something like that was going on, I certainly wouldn't have ah invested or have any dealings, absolutely.

(Subcomm. Ex. 22, p. 36-37)

* * * * *

Q. Okay, so I'm -- Just to complete the picture --

Judge Nixon: That's what I was, that's what I wanted to ask you, what allegation -- I've never heard, you know, never had the [Drew Fairchild] case never heard about the case except what I told you, and ah certainly had nothing to do with it.

(Subcomm. Ex. 22, p. 43)

* * * * *

Judge Nixon: I understand, but regardless, what connection have I had with ah Fairchild's son's case? Isn't that the bottom line?

Q. It, it basically --

Judge Nixon: I mean --

Q. Could well be the bottom line.

Judge Nixon: Yeah, what, what --

Q. And that's why --

Judge Nixon: Could I have conceivably done?

Q. Well, that's why I had to ask you --

Judge Nixon: To influence the case? Ah, I certainly didn't do a thing in the world. I don't know a thing about -- But what could I have done?

Q. Well, I mean, I don't know what you could have done. I mean it --

Judge Nixon: As United States District Judge.

Q. If someone wanted to use their imagination, I suppose they, they could think of things, and, and I, that's why we ask you the question did Bud Holmes ever talk to you about the case?

Judge Nixon: Oh, no.

(Subcomm. Ex. 22, p. 47-48)

During the April 1984 interview Judge Nixon did not reveal his meeting with Wiley Fairchild in which Mr. Fairchild had complained that he was being "blackmailed" by Bud Holmes in connection with Drew's case. Judge Nixon did not disclose his visit to Bud Holmes' farm and subsequent telephone conversation with Wiley Fairchild concerning Drew's case. Nor did Judge Nixon reveal his later telephone conversation with Carroll Ingram concerning Drew Fairchild. Instead, Judge Nixon repeatedly and categorically denied any knowledge or involvement whatsoever concerning Drew Fairchild and the drug case (Subcomm. Ex. 22).

Shortly after the April 19, 1984 interview, Judge Nixon telephoned Bud Holmes and told him that investigators had asked if he (Nixon) had tried to influence the Drew Fairchild case. Judge Nixon advised Mr. Holmes that he told the interviewers that he had not talked to Mr. Holmes or anyone else about the case and knew nothing about Drew Fairchild. Mr. Holmes knew this was untrue but adopted Judge Nixon's position so as not to cause the Judge embarrassment (Holmes Trial Tr. 757-758, 952; Holmes House Tr. 260-261).

Mr. Holmes later met with Judge Nixon in the Judge's chambers in Biloxi. According to Mr. Holmes, at this meeting the Judge again denied having talked to anyone about the Drew Fairchild case. Mr. Holmes testified that at that meeting Judge Nixon asked him if he knew whether the telephone call from the farm with Wiley Fairchild had been taped. When Mr. Holmes responded that he did not know, Judge Nixon asked him to find out (Holmes Trial Tr. 758-759, 958; Holmes House Tr. 262). Mr. Holmes asked Carroll Ingram, who advised Mr. Holmes that Wiley Fairchild did not usually tape calls, and Mr. Holmes reported this to Judge Nixon (Holmes Trial Tr. 760-761, 954; Ingram Trial Tr. 1075, 1190, 1193; Holmes House Tr. 262-263; Ingram House Tr. 378-379).[1]

E. Judge Nixon's Sworn Testimony Before the Grand Jury on July 18, 1984

In the summer of 1984 a special federal grand jury was empaneled in Hattiesburg to investigate possible criminality associated with the Fairchild-Nixon investment and the handling of the Drew Fairchild drug prosecution. Judge Nixon appeared voluntarily and testified under oath on July 18, 1984, the first day the grand jury was convened. Judge Nixon retained counsel prior to his grand jury appearance, and was represented by counsel at the time of his testimony (Subcomm. Ex. 23).

Judge Nixon was convicted of one count of making a false declaration before the grand jury,[2] a felony and a form of perjury, for the following testimony before the grand jury:

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[1] In reviewing the trial record concerning Judge Nixon's contacts with Holmes after the April 19, 1984 interview, the Fifth Circuit found that "[a] reasonable jury could conclude from these conversations that appellant was planning to hide the true facts from the grand jury and was soliciting Holmes' support." United States v. Nixon, 816 F.2d 1022, 1029 (1987). The House agrees with this conclusion.

[2] 18 U.S.C. Section 1623 provides that "Whoever under oath . . . in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both." In order to convict Judge Nixon of this form of perjury, the jury was required to find beyond a reasonable

> Q. The grand jury has heard evidence that the prosecutor, the state prosecutor, who eventually handled the case was an individual named Bud Holmes. Is he a friend of yours?
>
> A. Very good friend of mine, long time friend, yes.
>
> Q. Did he ever discuss the Drew Fairchild case with you?
>
> A. No, not to the best of my recollection. I think I would recall if he had.
>
> (Subcomm. Ex. 23, p. 47-48;
> Subcomm. Ex. 37)

The jury also found Judge Nixon guilty of making a second false declaration based on the following grand jury testimony:

> Q. All right. Judge, do you have anything you want to add?
>
> THE WITNESS: Yes, I do.

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doubt that Judge Nixon's grand jury testimony was false, and that Judge Nixon knew his testimony was false. See United States v. Nixon, 816 F.2d 1022, 1029 (5th Cir. 1987). In addition, to establish this offense, the false statements must be material to the grand jury's investigation. At Judge Nixon's trial the question of materiality was resolved out of the presence of the jury by the trial judge. On appeal Judge Nixon did not challenge the correctness of the trial court's ruling that the subject matter of Judge Nixon's statements to the grand jury was, as a matter of law, material to the grand jury's investigation, 816 F.2d at 1029.

I want to say this. I -- Here (indicating) are your notes too, copies of your instruments, rather.

I came here voluntarily and am very happy to cooperate with this grand jury and give them all the information that I have and that I could. And I have always thought everyone should do that, and that goes for the grand jury over which I'm supervising now, the other federal grand jury that's sitting at this time. I have nothing at all to -- had nothing to hide or nothing to withhold and I brought everything that you asked me to bring.

And I want to say this. That I've been told and led to believe and read in the newspaper and heard on the news media so much about this is an investigation of the Drew Fairchild criminal case. Now, I have had nothing whatsoever officially or unofficially to do with the Drew Fairchild criminal case in federal court or state court. I don't need to reconstruct anything with reference to that. I've told you that from the beginning.

I have never talked to anyone about the case, any federal judge or state judge, federal prosecutor or state prosecutor, and I never handled any aspect of this case in federal court. As you said, Judge Cox handled it. I don't know where -- someone told me maybe Judge Russell handled one of the other defendants also and-- but I never handled any part of it, never had a thing to do with it at all, and never talked to anyone, state or federal, prosecutor or judge, in any way influence anybody with respect to this case. Didn't know anything about it until I read that account in the newspaper. Didn't even know Mr. Fairchild had a son when I was dealing with him in the business transaction.

So I want to say that because I understand that's what this is all about. The investigation is apparently, if the news media is correct, and if I understand it correctly, that's what this is about, the Drew Fairchild criminal case.

(Subcomm. Ex. 23, p. 75-77;
Subcomm. Ex. 37)

Judge Nixon's closing statement to the grand jury was not spontaneous, but was prepared in writing by Judge Nixon prior to his grand jury appearance (Nixon House Tr. 517).

In addition to the foregoing grand jury testimony that was the focus of criminal charges and led to his convictions, Judge Nixon described to the grand jury his meetings with Wiley Fairchild as follows:

> Q. If the first meeting [with Wiley Fairchild] produced the deal, what would the other meetings have been for?
>
> A. I met with him several times. One time he told me that he thought he was over -- maybe overcharging me for these and would maybe put me in another later. He mentioned something about the name of a well was -- I don't know, remember when this was -- it had something to do with the name School in the property. But he never did and there never was any mention of it.
>
> And, as I say, I don't know of any reason I would have met with him after the transaction was finalized in the first part of 1981, but I can't say for sure. It's possible.
>
> You're asking me about -- I -- I don't like to keep repeating it -- but three or four years ago., and I'm trying to reconstruct this to the best of my recollection and knowledge.
>
> (Subcomm. Ex. 23, p. 56)

Thus, as he had done in his April interview, during his grand jury testimony Judge Nixon failed to disclose his conversations with Wiley Fairchild, Bud Holmes and Carroll Ingram concerning the Drew Fairchild matter, choosing instead to deny vehemently and repeatedly any knowledge whatsoever of Drew Fairchild and the drug case.

On July 19, 1984, the day following his grand jury testimony, Judge Nixon issued a press statement that included the following remarks:

> **I have read in the newspapers of a reported investigation of the handling of state drug cases against Mr. Drew Fairchild and others. The history of these cases can be provided by state authorities. I do not know Mr. Drew Fairchild; I have in no way participated in federal proceedings against other alleged participants with Mr. Drew Fairchild; I have never discussed the Drew Fairchild matter with Wiley Fairchild or any persons associated with the Fairchild companies; I never attempted to influence the handling of any aspect of the case; I have had absolutely nothing to do with any phase of the Drew Fairchild affair.**
>
> **(Subcomm. Ex. 24)**

Judge Nixon's public statement led Holmes to lie to the grand jury, to avoid "making Judge Nixon out not to be telling the truth" (Holmes House Tr. 263).

F. The Prosecution of Wiley Fairchild, Bud Holmes and Drew Fairchild

On September 6, 1984, the Hattiesburg grand jury indicted Wiley Fairchild on charges of perjury and paying an illegal gratuity to Judge Nixon. The perjury count alleged that Mr. Fairchild had instructed his employees to cover up his mineral transactions with Judge Nixon, and had failed to testify truthfully about this matter before the grand jury. The gratuity count was based upon the royalty payments to Judge Nixon (Subcomm. Ex. 25).[3]

Prior to trial Wiley Fairchild told his attorneys about Judge Nixon's involvement in his son's case. During plea bargain discussions Mr. Fairchild's attorneys made government prosecutors aware for the first time of the meeting with the Judge in which Mr. Fairchild complained of being blackmailed in connection with his son's case and the telephone call by Judge Nixon from Bud Holmes' farm (W. Fairchild Trial Tr. 527-528, 692; W. Fairchild House Tr. 183, 186-187; Subcomm. Ex. N-16). On November 26, 1984 Wiley Fairchild pled guilty to the illegal gratuity charge (Subcomm. Ex. 28). The perjury count was dismissed as part of the plea bargain, and in September 1985 Mr. Fairchild was sentenced to two months of incarceration, served at a halfway house in Jackson, Mississippi (Subcomm. Ex. 38).

On November 28, 1984, following the consummation of his plea agreement with the government, Wiley Fairchild appeared again before the Hattiesburg grand jury and described his meeting with Judge Nixon concerning Drew's case, the subsequent telephone call from Bud Holmes' farm, and the passing of Drew Fairchild's case to the files (W. Fairchild grand jury testimony of 11/28/84, p. 17-20).

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[3] United States v. Wiley Fairchild, Crim. No. H84-00009 (S.D. Miss., Hattiesburg Div). Count I of the indictment charged Mr. Fairchild with a violation of 18 U.S.C. Section 201(f), since amended, which prohibits the giving of a thing of value, such as royalty interests or a favorable loan, to a public official for and because of official acts to be performed by the public official. Mr. Fairchild pled guilty to this count of his indictment.

Federal prosecutors learned more about the telephone call from Bud Holmes' farm through an interview of Carroll Ingram in January 1985. After Mr. Ingram told Mr. Holmes that the government knew about the phone call and Judge Nixon's involvement in the Drew Fairchild case, Mr. Holmes met with Judge Nixon in the Judge's car after dark in the courthouse parking lot in Hattiesburg (Holmes Trial Tr. 762, 965; Holmes House Tr. 265-266; Ingram House Tr. 380-381). Mr. Holmes testified that he told Judge Nixon about Carroll Ingram's disclosure to the government and advised that they should not conceal the phone call any longer. According to Mr. Holmes, Judge Nixon responded that he did not know what Mr. Holmes was talking about and that he knew nothing about any phone call. Mr. Holmes testified that Judge Nixon then chastised him for talking with Mr. Ingram about the call (Holmes Trial Tr. 762-765; Holmes House Tr. 266-267).

A few days after his meeting in the parking lot with Judge Nixon, Bud Holmes appeared before the grand jury.

In his grand jury testimony Holmes admitted there had been a phone call, but tried to "soft peddle" and cover it up in a way that would protect both himself and Judge Nixon (Holmes Trial Tr. 970-971, 974, 985, 997; Holmes House Tr. 268-269).

In March 1985 Bud Holmes was indicted by the Hattiesburg grand jury on charges of perjury and obstruction of justice that in part alleged he had concealed evidence about the phone call with Wiley Fairchild from the farm (Subcomm. Ex. 31). Mr. Holmes and Judge Nixon thereafter had yet another conversation about the phone call in the spring of 1985, shortly before Mr. Holmes' scheduled trial on the obstruction and perjury charges. Mr. Holmes testified that he expressed concern about his case to Judge Nixon, who responded, "Well, I don't know why you picked up the phone and called Wiley and told him you were going to honor the deal with Bill Porter." Mr. Holmes interpreted Judge Nixon's words as "the way he (Nixon) wanted it to go" (Holmes Trial Tr. 765, 983, 987-990; Holmes House Tr. 272-273). After Mr. Holmes was indicted, he told Glen White that he had passed the Drew Fairchild case to the file because of the phone call Judge Nixon made to Wiley Fairchild from the farm (White Trial Tr. 1283-1284).

Bud Holmes' criminal trial began on June 17, 1985. After jury selection Mr. Holmes agreed to plead guilty to a criminal information charging him with contempt, with part of his contemptuous behavior being that he "...refused to disclose the substance of the aforementioned telephone call . . . ." (Subcomm. Ex. 33). As part of his plea, Mr. Holmes agreed to cooperate with the government and provide truthful testimony (Holmes Trial Tr. 768; Subcomm. Ex. 33). Mr. Holmes appeared again before the grand jury following his plea, apologized for covering up his knowledge of the telephone call and told the grand jury of Judge Nixon's involvement (Holmes Grand Jury testimony of 6/28/85; Defense Motion For New Trial Ex. 5). Mr. Holmes was fined $10,000 and sentenced to one year in prison following his guilty plea (Subcomm. Ex. 39).[4]

The special federal grand jury investigation also brought to a close the criminal prosecution of Drew Fairchild for his role in the drug smuggling conspiracy. After the passing of the case to the files in December 1982 and the restoration of the case to the active docket in January 1983, Drew's case had been continued because of delays in the Watkins prosecution until March of 1985 (D.

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[4] However, after paying his fine Mr. Holmes challenged the remainder of his sentence and on appeal, the Fifth Circuit Court of Appeals held that under the criminal contempt statute Mr. Holmes could be sentenced to a fine or imprisonment, but not both. Accordingly, Bud Holmes served no time in prison for his crime (Holmes House Tr. 277).

Fairchild Trial Tr. 122; Subcomm. Ex. N-1 (F)-(J)). At that point and as a consequence of the special federal grand jury investigation into the handling of his case, Drew Fairchild was indicted on federal drug conspiracy charges, pled guilty at arraignment and received a 3-year sentence with all but six months of the sentence suspended (Subcomm. Ex. 34).[5] Drew Fairchild was also sentenced to 3 years on his state charges, to be served concurrently with his federal sentence (D. Fairchild Trial Tr. 123-124). However, as a result of a letter agreement between Drew's counsel and current Forrest County District Attorney Glen White, Drew served no time in state prison above and beyond his federal time (Subcomm. Ex. 35).

Finally, the Department of Justice also prosecuted Robert Royals, Drew's co-manager at the airport who had never been prosecuted by Mississippi authorities. Mr. Royals was indicted by the special federal grand jury, convicted and sentenced to three years imprisonment for his role in the conspiracy.[6] Robert Watkins, the pilot of the drug-smuggling plane, remains a fugitive.

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[5] United States v. Redditt Andrew Fairchild, Crim. No. H85-00005 (S.D. Miss., Hattiesburg Div.).

[6] United States v. Royals, 777 F.2d 1089 (1985).

G. Judge Nixon's Post-Indictment Version of the Events

In both his April, 1984 interview with law enforcement authorities and his July 1984 grand jury testimony under oath, Judge Nixon made no mention of his meeting with Wiley Fairchild at the offices of W. R. Fairchild Construction Co. in Hattiesburg, his conversation with Bud Holmes concerning Drew's case, his subsequent telephone call to Wiley Fairchild from Mr. Holmes' farm, and his later conversation with Carroll Ingram concerning Drew Fairchild. Indeed, during the interview and before the grand jury Judge Nixon repeatedly and categorically denied any knowledge of the Drew Fairchild matter. It was only during his testimony at his criminal trial, after Mr. Holmes, Mr. Ingram and Wiley Fairchild cooperated with the government, that Judge Nixon finally acknowledged his participation in these events.

Judge Nixon now concedes that he met with Wiley Fairchild at the offices of Fairchild Construction Company, although he claims to have done so not at Wiley's specific request. Rather, Judge Nixon contends that he simply stopped by the Fairchild office to "keep in touch" with Wiley Fairchild and to discuss the progress of his investment (Nixon Trial Tr. 1536, 1670; Nixon House Tr. 430, 433). Judge Nixon also concedes that Wiley Fairchild raised the subject of "blackmail" in connection with Drew's case, and complained about the disparate treatment between his son's case and the non-prosecution of Robert Royals, the co-conspirator (Nixon House Tr. 502). Judge Nixon claims that when confronted with Mr. Fairchild's allegation of "blackmail," he did not probe more deeply because he was "not a law enforcement officer" or Mr. Fairchild's attorney (Nixon Trial Tr. 1672). According to Judge Nixon, Mr. Fairchild's complaints were "nonsense", but at the same time he was "shocked" by Mr. Fairchild's story (Nixon Trial Tr. 1674, 1677).

Judge Nixon insists that Wiley Fairchild did not ask him to do anything in connection with Drew's case. Nevertheless, Judge Nixon admits that he "had the impression" Mr. Fairchild wanted the Judge to speak with Mr. Holmes, and Judge Nixon relayed Mr. Fairchild's complaints to Bud Holmes that very same day, purportedly because Mr. Fairchild's blackmail concerns were "weighing on my [Nixon's] mind" (Nixon Trial Tr. 1535, 1538; Nixon House Tr. 505).

Judge Nixon denies meeting Mr. Holmes at the D.A.'s office, and contends he did not drive with Mr. Holmes to the farm (Nixon Trial Tr. 1537). However, the Judge admits meeting with Bud Holmes at the farm and speaking with Mr. Fairchild on the telephone. Judge Nixon contends that he did not "discuss" the facts of Drew's case and specifically told Mr. Holmes he did not want to discuss the case, but it is undisputed that Drew's case was a subject of his conversation with Mr. Holmes. Judge Nixon claims that Holmes was on the telephone, suddenly handed him the phone and said, "here, talk to Wiley Fairchild." Judge Nixon admits that during his telephone conversation Wiley Fairchild told him, "I'm glad you mentioned that matter to Bud ... I'm satisfied" (Nixon Trial Tr. 1539, 1541, 1543, 1588, 1685).

Judge Nixon disputes the date of his meeting with Wiley Fairchild, his visit to Bud Holmes' farm and his telephone call with Mr. Fairchild. Both Bud Holmes and Wiley Fairchild have repeatedly placed these events as occurring before Drew's case was passed to the file, and Carroll Ingram testified that his conversation with Wiley Fairchild about these events took place before Drew's case was passed to the file (Holmes Trial Tr. 737, 874-877, 906-908; W. Fairchild Trial Tr. 638, 660-662; Ingram Trial Tr. 1147-1148). In contrast, Judge Nixon contends that these events took place in March 1983, after Drew's case was passed to the file, such that his dialogue with Bud Holmes and Wiley Fairchild could have played no role in the handling of the Drew Fairchild drug prosecution (Nixon Trial Tr. 1529-1533).

At trial, Judge Nixon vigorously and repeatedly denied having been in Hattiesburg on May 14, 1982, the date Mr. Holmes believes the phone call may have taken place. Judge Nixon claimed that he was in Biloxi preparing for an asbestos trial (Nixon Trial Tr. 1548, 1554-1556). However, Judge Nixon's testimony was proven to be false during post-trial proceedings. Dental records confirmed that the Judge received treatment in Hattiesburg on May 14, 1982 (Subcomm. Ex. 14).

Judge Nixon conceded in his Subcommittee testimony that he "didn't know" what question could have been asked of him in his interview and grand jury testimony that would have elicited the truth (Nixon House Tr. 515). This answer confirms he had no intention of disclosing his full knowledge to the grand jury. Perhaps even more telling is Judge Nixon's admission to the Subcommittee that in the grand jury he deliberately chose not to reveal Wiley Fairchild's blackmail allegations, the meeting at Holmes' farm and the telephone call. His stated "justification"--that he believed the blackmail complaint was "nonsense," "had been resolved" and that it would have been "irresponsible" for him to reveal his knowledge to the grand jury (Nixon House Tr. 517) -- is a confession of guilt, not a legitimate defense. Judge Nixon placed himself above the law and tainted his judicial office when he consciously decided what portion of the truth federal investigators and the grand jury were entitled to hear. No witness, including a federal judge under investigation, may parcel the truth to serve his own purposes.

As noted by Professors Steven Lubet of Northwestern University School of Law and Andrew Kaufman of Harvard Law School during their testimony before the House Subcommittee, Judge Nixon's shadowy, behind-the-scenes involvement in the Drew Fairchild matter, even under his own version of the events, violated Canon 2 of the Code of Judicial Conduct (Lubet House Tr. 3/2/89, 18-20; Kaufman House Tr. 3/2/89, 43, 52).[7] By willingly becoming involved in the Drew Fairchild matter and using the prestige of his federal office for the benefit of the Fairchilds, apparently in an effort to enhance his financial relationship with Wiley Fairchild, Judge Nixon created the appearance of impropriety. Far worse, however, was his conscious decision to conceal the truth from federal investigators and the grand jury.

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[7] Canon 2 of the American Bar Association's Code of Judicial Conduct, the set of ethical standards governing judges, requires a judge to "avoid impropriety and the appearance of impropriety in all his activities." Canon 2(B) states that a judge "should not allow his family, social or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him" (Subcomm. Ex. 11, 3/2/89).

H. Judge Nixon's Handling of Federal Litigation Involving W. R. Fairchild Construction Co.

Through its independent inquiry into Judge Nixon's fitness to remain on the bench, the House discovered that Judge Nixon presided over two civil cases in which W. R. Fairchild Construction Company, of which Wiley Fairchild was managing partner and chief operating officer, was a party. In both cases Judge Nixon rendered rulings affecting Fairchild Construction Company, even as he was consummating and benefitting from his oil investment with Fairchild Construction Company. At no time did Judge Nixon recuse himself or disclose his relationship with Fairchild Construction Company to the other parties in the cases.

The first civil case, The Boam Co., et al. v. Dependable Insurance Co., et al., filed in October 1977, involved construction claims arising out of the erection of pump stations for a sewage system in Gulfport, Mississippi (House Tr. 3/2/89, 73). The case was assigned to Judge

Nixon. On August 24, 1978 Fairchild Construction Company, a subcontractor on the Gulfport sewer project, moved to intervene as a party in the case and claimed $18,600 in damages (House Tr. 3/2/89, 95). Fairchild Construction Company's motion was granted by a magistrate on September 7, 1978 (House Tr. 3/2/89, 96, 127). Judge Nixon then rendered judgments in the case filed by and against parties other than Fairchild Construction in February of 1979 (House Tr. 3/2/89, 131, 132). These judgments were contemporaneous with the Judge's first meeting with Carroll Ingram to discuss the possibility of investing with Wiley Fairchild (Nixon House Tr. 420). Indeed, according to Mr. Ingram it was Judge Nixon who first mentioned the name Fairchild (Ingram House Tr. 342), thus raising the specter of a federal judge knowingly soliciting a financial transaction from a party in a case pending before him.

During the spring and summer of 1979, Judge Nixon checked on Wiley Fairchild's reputation with, among others, Bud Holmes; reconfirmed with Carroll Ingram his interest in investing with Wiley and told Mr. Ingram that he could invest about $10,000; repeatedly contacted Mr. Ingram to determine Wiley's response; and ultimately learned from Mr. Ingram that Wiley Fairchild would be "delighted" to put the Judge in an oil deal (Nixon House Tr. 420-423).

Simultaneous with these events, in May of 1979 Dependable Insurance Company moved for summary judgment against Fairchild Construction in the Boam Co. case (House Tr. 3/2/89, 133-140). The motion was denied by Judge Nixon on August 8, 1979 (House Tr. 3/2/89, 149). As a result Fairchild Construction remained in the case with the opportunity to achieve a favorable outcome.

In June of 1979 Judge Nixon conducted a ten-minute hearing in which counsel for Fairchild Construction was present (House Tr. 3/2/89, 141). Judge Nixon advised the parties that he intended to refer the case to Magistrate Roper (Id. at 143-151). However, Judge Nixon continued to rule on pending motions. Magistrate Roper bifurcated trial of the case, and rendered a judgment as to two of the parties on September 6, 1979 (Id. at 153-154). The entire case ultimately settled immediately thereafter through consent of all parties. Fairchild Construction Company received $17,000 under the settlement agreement (Id. at 154-164).

Even after delegating day-to-day responsibility in Boam to Magistrate Roper, Judge Nixon remained involved in the Boam Co. case. Judge Nixon entered an August 8, 1979 summary judgment order in favor of Fairchild Construction (Id. at 149). Judge Nixon also signed the judgment involving other parties on September 7, 1979 (Id at 158); the settlement agreement on September 6, 1979 (Id. at 159-164); the order authorizing the disbursement of funds on October 12, 1979 (Id. at 165-167); and orders finally dismissing the case with prejudice, including an order dismissing Fairchild Construction Company, on January 30, 1980 (Id. at 169-173).

Judge Nixon was under a clear obligation to recuse himself from proceedings in The Boam Co. case after he solicited an investment with Wiley Fairchild.[8] However, at no point did he seek reassignment of the case or even disclose his relationship with Wiley Fairchild to the other parties (House Tr. 3/2/89, 398-409).

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[8] The judicial disqualification statute, 28 U.S.C. Section 455 (reprinted at House Tr. 3/2/89, 410-411, generally requires a judge to disqualify himself in any proceeding in which his impartiality might reasonably be questioned. In addition, Subsection (b) of the statute specifies particular circumstances in which a judge must disqualify himself, including where he has a personal bias or prejudice concerning a party, or where he "has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding."

The Code of Judicial Conduct (reprinted at House Tr. 3/2/89, 412-419) also required Judge Nixon's recusal from Boam or at least disclosure of his relationship with Mr. Fairchild to the other parties in the case. See e.g. Canon 3C, governing disqualification, and Canon 5C(4), prohibiting a judge from receiving a private, below-market loan not available to the public, and from receiving a loan from a party in a case pending before him.

Judge Nixon's failure to observe judicial ethics and the requirements of the disqualification statute in the context of his financial relationship with Wiley Fairchild does not end with the Boam Co. case. His participation in a second case, Jack Seymour v. L & A Contracting Co., et al., is even more disturbing.

The Seymour case involved severe injuries sustained by the plaintiff due to the collapse of a portion of a bridge. The matter was filed in February 1980 with damages of $6 million sought from six named defendants, including W. R. Fairchild Construction Company (House Tr. 3/2/89, 181-191). The case was originally assigned to Judge Dan Russell, who promptly recused himself because his nephew was an attorney with the law firm that represented Fairchild Construction Company in the case (Id. at 396). The matter was reassigned to Judge Nixon in March 1980 (Id. at 176). By this date, by his own admission, Judge Nixon "definitely" had a firm agreement to enter into a mineral investment with Wiley Fairchild (Nixon House Tr. 424).

Yet again, Judge Nixon failed to recuse himself or even disclose his dealings with Wiley Fairchild to the other parties (House Tr. 3/2/89, 378-385). On July 17, 1980, after preliminary discovery in the case, Fairchild Construction Company moved for summary judgment as to Mr. Seymour's personal injury claims (Id. at 325). Fairchild Construction's motion was not formally opposed by the plaintiff. On September 3, 1980 Judge Nixon granted the motion and rendered written findings of fact and conclusions of law in connection with his order (Id. at 328-337). By virtue of this order, Fairchild Construction had no direct liability for any of the plaintiff's injuries.

There was, however, a cross-claim by a co-defendant against Fairchild Construction for contribution and indemnity. Fairchild Construction moved for summary judgment on this claim as well, but after hearing oral argument Judge Nixon denied the motion on December 4, 1980, finding that "there exists a material issue of fact" requiring trial (Id. at 338, 340). As a result of this ruling, Fairchild Construction remained in the case with potential exposure on the cross-claim (Id. at 381-388).

The litigants in Seymour conducted discovery during 1981 and early 1982, and the case proceeded toward trial. However, in February 1981, without disclosure to the other parties in the case, Judge Nixon consummated his investment and $9500 loan with Fairchild Construction Company (Nixon House Tr. 424-426). Judge Nixon began receiving royalty checks on February 18, 1982 while the Seymour case was pending for trial, without recusing himself or disclosing the receipt of funds to the other parties (Subcomm. Ex. 11). By March 16, 1982, Judge Nixon had received nearly $7500 in royalties and made a $5,000 payment to Fairchild Construction on his loan (Id.)

On April 16, 1982 Judge Nixon conducted a 30-minute pre-trial conference in the Seymour case with all attorneys present, including counsel for Fairchild Construction (House Tr. 3/2/89, 357). Judge Nixon directed counsel to explore the possibility of settlement, and shortly thereafter a pre-trial settlement was negotiated between counsel and approved by Judge Nixon (Id. at 362-377). Under the terms of the settlement, Fairchild Construction made no contribution to a $670,000 settlement payment to Mr. Seymour and was released from all potential liability (House Tr. 3/2/89, 382-388). As of the date of the Seymour settlement, Judge Nixon had received a total of $9,553.39 through his oil investment with Fairchild Construction Co. The bulk of this money was paid to the Judge through four separate Fairchild Construction checks signed by Wiley Fairchild (Subcomm. Ex. 11).

At the March 2, 1989 hearing before the Subcommittee, Judge Nixon's counsel conceded that the Judge should have recused himself from the two cases, and noted that Judge Nixon did recuse himself in litigation involving one of the wells in which he purchased an interest (House Tr. 3/2/89, 60).[9] The Judge contends that he simply did not notice Fairchild Construction's involvement in the two cases (Id. at 71-72), a claim that is very difficult to believe given the many pleadings and orders signed by the Judge that identify Fairchild Construction as a party, as well as hearings and the Seymour pre-trial conference in which Fairchild Construction's attorney was present and actively participated (See, e.g., House Tr. 3/2/89, 61-64).

Fortunately, the evidence before the Senate shows no favoritism by Judge Nixon toward Fairchild Construction in the result of the two cases (House Tr. 3/2/89, 382-395). The parties in both cases reached out-of-court settlements acceptable to all parties apparently without any favoritism by the Judge on behalf of Fairchild Construction.

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[9] Transcontinental Gas Pipe Line Corp. v. Mississippi Sate Oil and Gas Board, et al., No. J82-0531(N)(S.D.Miss., Jackson Div.), involved one of the gas fields in which Judge Nixon had an interest as a result of his transaction with Fairchild Construction Company. Fairchild Construction was also an interested party in the case. Judge Nixon recused himself immediately from the case, although he disclosed only the fact of his interest in the gas field, not his relationship with Wiley Fairchild and his company (House Tr. 3/2/89 at 626).

Yet Judge Nixon's failure to disclose his relationship with Wiley Fairchild during the Boam and Seymour litigation is further evidence of a pattern of concealing the "whole truth" about his dealings with Mr. Fairchild. Failure to recuse in only one case involving Fairchild might simply be the result of coincidence and inadvertence. Failure to recuse in two cases instead suggests that Judge Nixon intended to continue to preside over Fairchild litigation, notwithstanding his ethical responsibilities. Given the evidence concerning Judge Nixon's gratitude to Wiley Fairchild, his willingness to help Fairchild if he could, and his desire for additional investments, one may easily conclude that Judge Nixon consciously continued to handle the two cases to enhance his financial relationship with Fairchild. Moreover, the Senate may find it useful in assessing Judge Nixon's credibility to compare his contention that he "didn't notice" Fairchild was a party with the many pleadings and orders bearing the Fairchild name in the two cases.

I. The Consequences of Judge Nixon's Misconduct

On August 29, 1985, Judge Nixon was indicted by a federal grand jury sitting in Hattiesburg, Mississippi on one count of accepting an illegal gratuity in violation of 18 U.S.C. Section 201(g), and three counts of perjury (false declaration before a grand jury) in violation of 18 U.S.C. Section 1623 (Subcomm. Ex. 37).

On February 9, 1986, following a two-week trial presided over by Judge James H. Meredith of the Eastern District of Missouri, and after deliberating for 18 hours, the jury unanimously acquitted Judge Nixon of the illegal gratuity count and one perjury count, but convicted him of the two other perjury counts (Subcomm. Ex. 41). On March 31, 1986, Judge Meredith denied Judge Nixon's post-trial motions for acquittal and a new trial, and imposed a sentence of five years on each of the perjury counts, to run concurrently (Subcomm. Exs. 42 and 43). Judge Nixon was released on his own recognizance pending appeal of his convictions.

On September 24, 1986, while his appeal was pending, the Supreme Court of Mississippi suspended Judge Nixon's license to practice law in that state, finding the perjury is a felony involving "dishonesty, misrepresentation and deceit" such as to warrant suspension of his professional license (Subcomm. Ex. 48). The State of Louisiana also suspended Judge Nixon's license to practice law, pending disbarment proceedings in that state.

On April 30, 1987, the Fifth Circuit Court of Appeals affirmed the criminal convictions, and thereafter denied Judge Nixon's petition for rehearing en banc (Subcomm. Exs. 44 and 45). On January 19, 1988, the United States Supreme Court denied Judge Nixon's petition for writ of certiorari (Subcomm. Ex. 46).

On February 11, 1988, following exhaustion of Judge Nixon' appellate rights, the Judicial Council of the Fifth Circuit certified to the Judicial Conference, as provided by 28 U.S.C. Section 372(c)(7)(B), that Judge Nixon had engaged in conduct that might constitute grounds for impeachment under Article I of the United States Constitution (Subcomm. Ex. 50). On March 15, 1988, based on the criminal convictions, the Judicial Conference certified and transmitted to the Speaker of the House of Representatives a determination that Judge Nixon's impeachment may be warranted (Id.).

On March 23, 1988, Judge Nixon reported to Eglin Air Force Base Camp in Florida to begin serving his sentence. Judge Nixon relinquished all judicial responsibilities following his indictment in August, 1985, and has not performed the duties of his position since that date. However, he will continue to draw his judicial salary for life, currently $89,500 per year, unless and until he resigns or is removed from the bench by the Senate.

While the House was conducting its independent impeachment investigation, Judge Nixon sought to vacate his criminal conviction and sentence through a post-conviction petition, filed pursuant to 28 U.S.C. Section 2255, that alleged a variety of prosecutorial misconduct. The matter was assigned to Chief Judge John F. Nangle of the Eastern District of Missouri, and an evidentiary hearing on the petition was held in Jackson, Mississippi on August 29 and 30, 1988. After considering the evidence and argument by the parties, on December 19, 1988 Judge Nangle rejected the claims of prosecutorial misconduct and denied the motion to vacate the convictions. Nixon v. U.S., 703 F.Supp. 538 (S.D.Miss. 1988). An appeal to the Fifth Circuit of this post-conviction ruling is pending.

Only the second judge in the history of our nation to be convicted of a crime while serving on the bench, Judge Nixon admits that he has caused "pain" to the federal judiciary (Subcomm. Ex. 47 at 569). Judge Nixon's failure to tell the truth and the consequences of that misconduct have cast a shadow upon the integrity of the judiciary. Public respect for the law and the courts can be maintained only through Judge Nixon's removal from office.

J. The Prior Record Establishes No Prosecutorial Misconduct

Judge Nixon's claims of prosecutorial misconduct were thoroughly litigated and resolved against him in the post-conviction proceedings. Nixon v. United States, 703 F.Supp. 538 (S.D. Miss. 1988). After hearing the evidence, the District Court concluded that the government did not knowingly use false testimony at Judge Nixon's trial, nor did it unfairly "manipulate" witnesses through inducements.

Contrary to Respondent's contentions in his Pre-trial Statement, the prior record establishes that:

1. Wiley Fairchild and Bud Holmes did not lie at Judge Nixon's trial, nor did the government ever urge them to do so (Holmes House Tr. 227; W. Fairchild House Tr. 187-188). Respondent relies upon testimony of Mr. Fairchild at the post-conviction hearing. However, in a sworn deposition taken during the House proceedings, Mr. Fairchild stated that he was "confused" during the post-conviction hearing and reconfirmed that he told the truth to the best of his ability at Judge Nixon's trial.

2. The "scripts" and "testimonial outlines" that Respondent attaches as evidence of misconduct were simply documents containing relevant, truthful information used to

prepare Wiley Fairchild for his trial testimony. See 703 F.Supp. at 563; Weingarten P.C. Tr. 374, 377, 395, 431-436.

3. The government did not "lead" Wiley Fairchild with promises and inducements. Contrary to Respondent's claims, the government did not promise Wiley Fairchild that it would help him obtain a pardon. See 703 F.Supp. at 557; Weingarten P. C. Tr. 380-381; W. Fairchild House Tr. 188. The government did not promise Wiley Fairchild, as part of his plea agreement, that it would do what it could to help Drew in dealing with his drug charges. See 703 F.Supp. at 558; Hess P. C. Tr. 285-286; Little P. C. Tr. 340, 346-347; Weingarten P. C. Tr. 389-390; W. Fairchild House Tr. 188. Nor did the government promise Wiley Fairchild, as part of his plea agreement, that it might dismiss the gratuity charge to which he pled guilty. See 703 F. Supp. at 558; Hess P. C. Tr. 249-251 and 276-278; Weingarten P. C. Tr. 377-378.

II. SPECIFIC REBUTTAL TO JUDGE NIXON'S PRE-TRIAL STATEMENT

At the request of the Impeachment Trial Committee, the House offers this specific rebuttal to certain additional points raised by Respondent in his Pre-trial Statement filed July 31, 1989.

1. This case involves specific false or misleading statements, not a mere failure to "volunteer" information. Respondent definitively told law enforcement officials in his April 1984 interview that he "certainly never discussed anything" about the Drew Fairchild case with Wiley Fairchild (p. 25); that he had "absolutely" no knowledge of the case (p. 31); that Wiley Fairchild never "brought up" his son's case (p. 32); that the Judge "didn't even know he [Drew] existed, except for what he learned from the interviewers and what he had read in the newspaper (p. 36); that "nothing was ever mentioned about Wiley Fairchild's son (p. 37); that the Judge "never heard about the case" (p. 48).

Similarly, Judge Nixon told the grand jury under oath that he did not know "of any reason I would have met with him [Wiley Fairchild] after the transaction was finalized in the first part of 1981" (p. 56); that he never "talked to anyone" about the Drew Fairchild case (p. 76); etc. In short, Judge Nixon did not simply fail to "volunteer" information. Rather, he made repeated, categorical denials, both during the interview and his grand jury testimony, that were specifically false or misleading.

2. Judge Nixon contends that his conversations with Bud Holmes and Wiley Fairchild concerning the Drew Fairchild case occurred in March 1983. This is in contrast to the testimony of Holmes, Ingram and Wiley Fairchild that

Judge Nixon's involvement occurred in 1982, before Drew's case was passed to the files.

In his Pre-trial Statement, Judge Nixon attaches great significance to the date of his conversations with Holmes and Wiley Fairchild concerning the Drew Fairchild case. This is contrary to Judge Nixon's position during the House proceedings, when he argued that the date of the conversations was "largely irrelevant to whether Judge Nixon made false statements before the grand jury" and of "limited significance." (House Subcommittee Hearing Volume, Appendix 1 at 1873.)

As the House noted during its argument on the pre-trial motions, the date of Judge Nixon's conversations is relevant only as to whether Judge Nixon influenced the handling of the Drew Fairchild case. Only two of the fourteen statements at issue in this impeachment--the statements alleged in Article II [repeated in Article III(2)(G)] and Article III (1)(F)--deal with Judge Nixon's influencing the case. Proof that the remaining twelve statements are false or misleading does not rest upon when the conversation took place, for these twelve statements are all categorical denials of knowledge or involvement, not dependent on a particular date.

3. Judge Nixon contends that his conversations with Holmes and Wiley Fairchild were insignificant. Again,

as previously cited, this is in contrast to the testimony of Holmes, Ingram, Wiley Fairchild and, to a lesser extent, Glen White and Judge Jack Weldy. As a consequence of Judge Nixon's involvement, Drew Fairchild's case was temporarily passed to the file in an unprecedented manner; Wiley Fairchild became "satisfied" with the handling of his son's case; and the Judge sought to make use of the positive results from his intervention to enhance his prospects for obtaining additional valuable investments from Wiley Fairchild.

4. The prior record clearly establishes that Judge Nixon's statements were material to the federal investigation. David Ward, the grand jury foreman, so testified (Ward Trial Tr. 60-66). The trial court found Judge Nixon's statements to be material (Trial Tr. 80). On appeal Judge Nixon did not challenge the trial court's finding of materiality. U.S. v. Nixon, 816 F. 2d at 1029.

5. Contrary to the contentions in his Pretrial Statement, Judge Nixon well knew that a principal focus of the federal investigation was the handling of the Drew Fairchild case. During the interview the Judge was specifically told that investigators were looking at the Drew Fairchild case "from top to bottom," including the passing of the case to the files and the fact that Drew had never been sentenced despite the strong evidence of his

guilt (Subcomm. Ex. 22 at 38, 45). Judge Nixon himself noted during his grand jury testimony (Subcomm. Ex. 23 at 77) that the focus of the investigation was the Drew Fairchild case. There can be no legitimate claim that Judge Nixon so "misunderstood" the focus of the investigation that his repeated denials of knowledge of the Drew Fairchild matter were inadvertent.

6. It is ironic that Respondent should rest his defense principally upon the purported "changing" testimony of Bud Holmes and Wiley Fairchild. For if there is any witness who has "changed" his testimony, it is Judge Nixon himself. Indeed, in this case the main witness against Judge Nixon is, in fact, the Judge himself. It is simply impossible to reconcile in any reasonable way Judge Nixon's repeated, categorical statements in the interview and before the grand jury with Judge Nixon's own version today of his conversations with Wiley Fairchild, Bud Holmes and Carroll Ingram. For example,

-- Judge Nixon told the interviewers he had "absolutely" no knowledge of the Drew Fairchild case except for what he read in the newspaper (Subcomm. Ex. 22 at 31) Yet Judge Nixon now concedes he knew of the case from his conversations with Wiley Fairchild and Bud Holmes (Nixon Trial Tr. 1539 -1540; Nixon House Tr. at 1539-1540).

-- Judge Nixon told the interviewers that Wiley Fairchild never brought up the subject of his son's case (Subcomm. Ex. 22 at 32). Judge Nixon now concedes that Fairchild did bring up the subject, but purportedly not at the time when the Judge was "dealing" with Wiley Fairchild (Nixon House Tr. 503-504). Yet Judge Nixon obviously was still dealing with Fairchild at the time. The Judge was still receiving royalty payments, had discussed other possible investments with Wiley Fairchild, and was willing to discuss other investments with Wiley Fairchild on the very day when Fairchild complained about being blackmailed in connection with his son's case (Nixon Trial Tr. 1668-1669; Nixon House Tr. 503-504).

-- Judge Nixon told the interviewers he "didn't even know he [Drew Fairchild] existed," except for what he read about in the newspaper and learned during the interview (Subcomm. Ex. 22 at 33). Yet Judge Nixon now concedes that he knew Drew existed from his conversations with Wiley Fairchild (Nixon House Tr. 509).

-- Judge Nixon told the interviewers that "nothing was ever mentioned about Wiley Fairchild's son" (Subcomm. Ex. 22 at 37). Yet Judge Nixon now admits that Drew Fairchild was mentioned during the Judge's conversations with Wiley Fairchild and Bud Holmes (Nixon House Tr. 432, 464, 503).

-- Judge Nixon told the grand jury he "never talked with anyone" about the Drew Fairchild case (Subcomm. Ex. 23 at 76). This statement is contradicted by the Judge's own version of his dialogue with Wiley Fairchild and Bud Holmes (Nixon House Tr. 432-434, 464).

-- Judge Nixon told the grand jury he "didn't know of any reason" he would have met with Wiley Fairchild after the investment was finalized in 1981 (Subcomm. Ex. 23 at 56). Yet Judge Nixon concedes that at the time of his grand jury appearance he specifically recalled the meeting when Fairchild complained about how Drew's case was being handled (Nixon Trial Tr. 1585-1586).

Although Judge Nixon attacks the credibility of Bud Holmes and Wiley Fairchild, the prior record establishes that the Judge himself is simply not a credible witness.

Just as the jury found Judge Nixon's grand jury testimony to be false in finding him guilty of perjury, so too should the Senate disregard his testimony as untruthful, and remove him from the bench because of his untruthfulness.

7. The House disagrees with Respondent's contention that "beyond a reasonable doubt" should be the standard of proof in this proceeding. This standard was specifically rejected by the Senate during the Claiborne impeachment proceedings. Alternatively, Respondent argues that a "preponderance of the evidence" establishing that Judge Nixon gave false or misleading testimony would be insufficient to remove him from the bench. The House disagrees.

The Senate itself will decide what degree of proof applies, consistent with the standard of conduct it expects of federal judges and the need for public confidence in the integrity of the judiciary. But logic dictates that a lesser standard of proof apply. Judge Nixon's personal interest in retaining the high privilege of serving as a federal judge is less important than private rights of liberty and property at stake in criminal and civil cases. Moreover, the standard of proof must take into account the fact that public respect for the law and confidence in the integrity of the judiciary cannot be compromised.

Respectfully submitted,

The United States
House of Representatives

By Alan I. Baron (PEK)
Alan I. Baron
Special Counsel

August 9, 1989

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RECEIVED AUG 10 1989

Hon. Wyche Fowler, Jr.
Chairman
Impeachment Trial Committee
Hart Senate Office Building
Room SH 902-D
Washington, D.C. 20510

Attention: Anthony Harvey

Dear Chairman Fowler:

I enclose copies of Respondent's Exhibits 1 through 68, as listed in the enclosed index. (We have eliminated several exhibits which have been included among the House Managers' exhibits.) We are still trying to resolve the completeness of page numbering and we will notify you as soon as possible, but we are enclosing our best current version of these exhibits.

Very truly yours,

David O. Stewart/paa

David Overlock Stewart

PMB/paa

Enclosure

cc w/enc: Peter Keith

IN THE SENATE OF THE UNITED STATES
Sitting As A Court Of Impeachment

In re
IMPEACHMENT OF
WALTER L. NIXON, JR.

JUDGE NIXON'S DESIGNATION OF ADDITIONAL EXHIBITS

Respondent, through his undersigned counsel, hereby designates the following materials as additional exhibits in this proceeding. All of these materials except Exhibit 41A have come into the possession of Judge Nixon or his counsel only during the last several days, as a result of discovery of government records that was ordered in this proceeding or as a result of further investigation of potential witnesses. Accordingly, we were unable to include these materials in our initial listing of potential exhibits. Exhibit 41A was inadvertently omitted from our initial set of exhibits due to oversight, and is a grand jury transcript that the House Managers have had in their possession for many months.

Additional Exhibits

41A. Nov. 28, 1984 --	Grand jury testimony of Wiley Fairchild
69. Aug. 21, 1981 --	Working documents prepared for Drew Fairchild prosecution by Forrest County District Attorney's office

ADDEXHIB.NX

70. Jan. 1981 to June 1982 -- Visiting records for inmate Joseph E. Krohn, Maxwell Air Force Base Federal Prison Camp (Government Trial Exhibits 24 and 25).

71. Sept. 13, 1981 -- "Georgia Tech Beats Alabama," New York Times

72. Sept. 16, 1982 -- Memorandum reflecting interest calculation by Robert "Skip" Jarvis of Fairchild Construction Co.

73. January 1983 -- Videotape and transcript of interview with Paul "Bud" Holmes by Nancy Allday, WDAN-TV, Hattiesburg, Mississippi

74. Aug. 10, 1984 -- "Gag" Order entered by Judge John Parker to stop investigative leaks by federal investigators

Respectfully submitted,

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Date: August [illegible], 1989

IN THE SENATE OF THE UNITED STATES
Sitting As A Court Of Impeachment

In re)
)
IMPEACHMENT OF)
JUDGE WALTER L. NIXON, JR.)

JUDGE NIXON'S REPLY TO THE HOUSE MANAGERS' PRETRIAL SUMMARY OF FACTS AND ISSUES

The House Managers have submitted a lengthy pretrial statement that purports to summarize the facts in this case. In fact, the House's pretrial statement misstates and omits crucial information. We thus submit this pleading to set the record straight and prevent the Senate from trying this case under any mistaken assumptions about the events that are at issue. We make no response at this time to the House Managers' unfounded arguments and improper inferences -- the impeachment hearings are the appropriate time and place for that. Rather, we now identify some of the most egregious distortions of fact in the House Managers' pleading.

DREW FAIRCHILD'S CASE

1. At pages 16, 17, and 26 of their Pretrial Summary, the House Managers state that Holmes passed Drew's case to the files because he wanted to "sweep it under the rug." What the House Managers omit is that Holmes also testified to the contrary:

> Q. [W]as it your intention that the case would simply go away; that you would sweep it under the rug as opposed to ultimately sentence Drew Fairchild?
>
> A. I doubt seriously if I had any type thought process at that time about it; you know, well, I'll be glad to do even better than what I've already done if it'll make you look like a hero. I was wanting to make him look like a hero.

Holmes House Tr. 248.

2. In describing the passing of the case to the files in December 1982, the House Managers state on page 17 of their Summary: "Indeed, Drew's attorney, Bill Porter, had asked Bud Holmes to carry out the plea agreement and have Drew sentenced before a particular judge who was presiding over the case left the bench." The House Managers cite Holmes House Tr. 259.

The House Managers have completely garbled the facts. In fact, on page 259 of the House Transcript, Holmes testified about his actions in December 1983 when Holmes, not any judge, was leaving office, and a full month after Porter had drowned. Holmes' testimony was that, before he drowned, Porter requested that Drew be sentenced before Holmes left office "because he did not know if Glenn White, who had been elected, would live up to, you know, the agreement." Holmes House Tr. 259.

THE TELEPHONE CALL FROM BUD HOLMES' FARM

3. At page 24 of the Summary, the House Managers state that Wiley and Holmes had similar recollections of the phone call from Holmes' farm to Wiley. In reality, their recollections were very different. Holmes claimed that Nixon thanked Wiley on the telephone for the investment, and that he (Holmes) promised to pass Drew's case to the files. Wiley disputed both aspects of Holmes' testimony. Wiley House Tr. 178-80.

4. At page 33 of the Summary, the House Managers describe Holmes' testimony that Nixon supposedly asked if Wiley had taped the phone call, and then cite Holmes' request to Carroll Ingram on that subject. The House Managers place this event in their chronology before Nixon's grand jury testimony in July 1984. The House Managers ignore Ingram's testimony that Holmes' request came after the grand jury session in July 1984 and that Holmes gave no indication of making the request on behalf of Nixon. Ingram House Tr. 378-79.

5. At page 40 of their Summary, the House Managers describe Holmes' version of the February 1985 parking-lot conversation, in which, Holmes claimed, Nixon allegedly denied that the telephone call to Wiley had occurred. The House Managers state at page 41 that Holmes thereafter gave

false grand jury testimony with respect to the telephone call to "protect both himself and Judge Nixon." Holmes has admitted, however, that -- before he went to the grand jury in February -- he was advised by Nixon's lawyer that Nixon would confirm that the phone call occurred. Holmes House Tr. 320. Consequently Holmes' subsequent false testimony to the grand jury cannot be attributed to any supposed intent to protect Judge Nixon. Indeed, under cross-examination, Holmes conceded that the false grand jury testimony did not protect Judge Nixon at all. Holmes House Tr. 320-21.

THE OIL PROPERTIES

6. At page 4 of their Pretrial Summary, the House Managers state, "Wiley Fairchild never offered mineral interests to the general public. Rather, he purchased oil and gas leases and then developed wells and kept the profit. Judge Nixon knew Mr. Fairchild was not in the business of selling oil interests to the public at large." But this statement is seriously misleading, as established in Carroll Ingram's congressional testimony (p. 344):

> Q. . . . . [W]as Mr. Fairchild in the business of selling mineral interests?
>
> A. Yes, he was.
>
> Q. To whom?
>
> A. To anybody that he felt he could make a profit on or make a reasonably good business deal on. Now, he did not sell minerals to the street. He didn't sell minerals to the public. So I

> am not conveying that idea. But, yes, I mean he entered into all kinds of mineral and royalty and working interests, even drilling interests.
>
> He drilled his own wells and did his -- so, you bet, he conveyed and sold to many entities throughout the country, oil interests.
>
> . . . .
>
> But there were a number of business people, a number of associates, acquaintances, entities, relations, affiliates that he sold mineral interests to.

7. At pages 4-5, the House Managers state that Wiley Fairchild picked "three wells that he felt would be profitable for the Judge . . . . and picked three of his best wells." The House Managers' citations for those statements simply do not support them. In the trial transcript at pp. 494-95, Wiley said he wanted to put Nixon in "some deals that were good," and that he thought the Wilkie well "was a good well." In his House testimony, Wiley says nothing at p. 155 in support of the House Managers' assertions, while at p. 159 Wiley testified only that the Ross well was "not the big producer" and was "least productive." On the prior page, he was asked why he selected three wells rather than, say, one well, and he responded that "that one well could have been bad, and that would cut down your risk when you put him in three wells." Wiley thus never testified that he picked three of his best wells.

8. At page 6 of their Summary, the House Managers state that after Ingram reviewed the draft conveyances to Judge Nixon, "Mr. Fairchild then instructed Mr. Jarvis to revise the draft documents by tripling the acreage to be sold to Judge Nixon and by backdating the documents a year." The House Managers also state that Judge Nixon "claims" that the documents were "backdated" to reflect the date of the verbal agreement (Pretrial Summary 6-7).

The House Managers completely omit Carroll Ingram's explanation that he probably instructed Jarvis to increase the acreage because the initial conveyances had been drafted in error, and that Wiley had intended to sell the larger acreages to Judge Nixon. Ingram House Tr. 363-64; Wiley House Tr. 199. The House Managers also omit the testimony that the documents were dated to reflect the actual date of the oral agreement, which four trial witnesses, including an oil-and-gas expert, agreed is customary practice in documenting oil transactions. Trial Tr. 1060-61 (Ingram); 502 (Wiley); 319 (Jarvis); 1405-07 (Massey). Indeed, Wiley had told Jarvis in the FBI-taped conversation that the deeds were dated "to when it [the sale to Judge Nixon] had been made." Defendant's Trial Ex. 16a at 12; see also Wiley House Tr. 203-04. Thus, it is not Judge Nixon's "claim," but the undisputed record testimony that explains the dating of the documents.

9. At page 6 of their Summary, the House Managers further assert that, "By February 1981, when the documents were backdated, Wiley's son Drew had been identified by federal authorities as a co-conspirator in a major marijuana smuggling effort at the Hattiesburg Airport." The House notes that the federal investigation "sought to determine whether the backdating was part of an effort to cover up a bribe of the Judge in return for assistance in Drew Fairchild's drug troubles."

The House Managers omit the clear conclusion by the grand jury, the petit jury, and the House of Representatives that the backdating was not part of an effort to cover up a bribe of the judge. Moreover, the attempt to suggest an improper motive for the dating of the documents is belied by the simple explanation given by both Wiley and Ingram (see para. 8 above). Finally, the House's suggestion flies in the face of logic, given the fact, omitted by the House, that on Nov. 19, 1980, Drew already had reached his plea bargain, as set forth in the Memorandum of Understanding. House Ex. 15. At the time the oil documents were prepared, therefore, Drew's case would have appeared to Wiley to be over and would occasion no concern about the appearance of the transaction with Judge Nixon.

10. At the bottom of page 7 of their Summary, the House Managers suggest that Judge Nixon's financial disclosure report for 1980 was somehow inaccurate because it did not reflect the purchase of royalty interests from Wiley Fairchild (for which the documents were not executed until 1981). But the federal prosecutor himself agreed that the financial disclosure statement was accurate, on the ground that, "if there was no written deal in 1980, he [Nixon] didn't have to report it." Weingarten House Tr. 101.

11. At page 8 of their Summary, the House Managers state, "the language of the conveyances suggests that if the wells failed to produce, Judge Nixon may have had no obligation to pay for the investment." The House does not -- and could not -- cite any such language in the conveyances, or any of the transactional documents, to support this nonsensical assertion. Moreover, the attorney involved in the transaction, Carroll Ingram, flatly rejected this totally unsupported theory of Impeachment Counsel. Ingram House Tr. 368.

12. At page 12 of the Summary, the House Managers state that Nixon "sought to become involved in additional mineral transactions with Wiley Fairchild. In the fall of 1982 the two men discussed the possibility of another investment." Nothing could be further from the truth. Wiley testified

that at a social occasion, he (Wiley) mentioned to Nixon that he might have another well that Nixon would want to buy into. Trial Tr. 519, 603-05. Nixon's testimony is the same. Nixon House Tr. 432. No other discussion took place on the subject of further investments. There is no record support for the view that Nixon sought such further investments.

BOAM AND SEYMOUR CASES

13. With respect to the House Managers' discussion of the Boam and Seymour cases, we note only that the House has not alleged Judge Nixon's failure to recuse himself in these cases as a basis for any article of impeachment. Nor, as the House's own expert witness, Professor Kaufman, testified, would such an impeachment article be warranted, where, as here, there is absolutely no evidence of an intent on Judge Nixon's part to act wrongfully. Kaufman House Tr. 44.

Respectfully submitted,

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Date: August 30, 1989

IN THE SENATE OF THE UNITED STATES
Sitting As A Court Of Impeachment

In re IMPEACHMENT OF WALTER L. NIXON, JR.	)))))

STIPULATION OF WITNESS TESTIMONY

The House Managers and respondent Walter L. Nixon hereby agree and stipulate that if the following witnesses were summoned to testify before the Senate in these impeachment proceedings, they would give the following testimony as indicated herein.

Betty Lou Watkins

Ms. Watkins has worked as Judge Nixon's secretary since 1982. She would testify as follows:

(1) She has reviewed all issues of the Hattiesburg American and the Jackson Clarion-Ledger, which are the major newspapers circulated in the Hattiesburg area, for the period August 1980 through April 1983. In that review, she looked for any and all publicity concerning the Drew Fairchild drug prosecution. As a result of that review, she has identified the following articles as the only articles appearing in

those newspapers in that period that referred to the Drew Fairchild drug prosecution:

Hattiesburg American:

August 4, 1980: "Four arrested -- Planeload of marijuana seized at local airport" (Drew Fairchild not named)

August 5, 1980: "Bond set for 4 jailed in drug bust" (Drew Fairchild not named)

August 27, 1981: "Local man is indicted in 1980 airport pot bust" (Drew Fairchild named)

August 29, 1981: "Municipal Airport has been attractive to drug smugglers" (Drew Fairchild named)

Jan. 5, 1982: "Drug deal suspect arrested in Texas" (Drew Fairchild named)

Jan. 7, 1983: "Weldy Passes To Inactive File Fairchild Drug Smuggling Charge" (Drew Fairchild named)

Jan. 27, 1983: "Fairchild Case Returns to Active Files" (Drew Fairchild named)

Jackson Clarion-Ledger

Aug. 5, 1980: "Agents seize 1,900 pounds of pot" (Drew Fairchild not named)

2. Respondent's Exhibit 17, a telephone message reflecting that Bud Holmes called Judge Nixon at the federal courthouse in Hattiesburg during the noon hour on March 11, 1983, was prepared by Ms. Watkins, at the time reflected on Exhibit 17, as part of her ordinary employment duties.

Michael B. Holleman

Mr. Holleman, an attorney in Gulfport, Mississippi, has represented Judge Nixon both in these impeachment proceedings and in the post-conviction proceeding in federal court. In August 1988, on the Friday before the hearing on the post-conviction motion in Jackson, Mr. Holleman and other counsel for Judge Nixon visited the offices of Fairchild Construction Co. in Hattiesburg. During conversations with Fairchild Construction personnel and counsel, Mr. Holleman asked for permission to review certain papers which were stored in a closet in John Baltar's former office in the building. Mr. Baltar had previously told Mr. Holleman that he had left all materials relating to the grand jury investigation in that closet. Upon being given permission to examine the materials in that closet, Mr. Holleman did review them, and found in those materials the following materials: Respondent's Exhibits 37, 38, 39, 40, and 41. Counsel for Judge Nixon then received permission from Fairchild Construction Co. personnel and counsel to remove those items for use in legal proceedings concerning Judge Nixon.

James Halsted

Mr. Halsted is a professor of criminology at the University of South Florida. In 1986, he was retained by a Mississippi television station to attend the Nixon trial in Hattiesburg and provide expert commentary on the proceedings. Following the trial, Mr. Halsted remained interested in the

Nixon case and intended to write an article on the subject. As part of his preparation to write about the Nixon trial, Mr. Halsted interviewed Paul "Bud" Holmes over the telephone on two occasions, and made tape-recordings of those conversations. Those tape-recordings and the transcripts of those conversations are marked as Respondent's Exhibits 63 and 64.

Karl Kepper

Mr. Kepper, a private attorney in Hattiesburg, Mississippi, was one of the counsel representing Wiley Fairchild during the grand jury investigation. Mr. Kepper himself testified before the grand jury, and the transcript of his grand jury testimony is marked as Respondent's Exhibit 47. That transcript, it is stipulated and agreed, shall be included in the record of this proceeding in lieu of live testimony by Mr. Kepper.

STIPULATED AND AGREED TO BY:

David O. Stewart
DAVID OVERLOCK STEWART
PETER M. BRODY
ROPES & GRAY
1001 Pennsylvania Ave., N.W.
Suite 1200 South
Washington, D.C. 20004
(202) 626-3900

Counsel for Judge Nixon

The United States House
of Representatives

By Alan I. Baron (PEK)
Alan I. Baron
Special Counsel

Peter E. Keith
Assistant Special Counsel

Managers of the House of
Representatives

Jack Brooks
Don Edwards
Benjamin L. Cardin
F. James Sensenbrenner
William E. Dannemeyer

Date: August 30, 1989

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September 1, 1989

BY HAND

The Honorable Wyche Fowler, Jr.
Chairman
Impeachment Trial Committee
Hart Senate Office Building
Room SH 902-D
Washington, D.C. 20510

Attention: Anthony Harvey

Dear Mr. Harvey:

The following is a list of possible character witnesses that Judge Nixon may present:

Honorable Charles Clark
Chief Judge
U.S. Court of Appeals for
the Fifth Circuit
302 U.S. Post Office & Courthouse
P.O. Drawer 2219
Jackson, Mississippi 39225

Honorable Peter Beer
United States District Judge
Eastern District of Louisiana
U.S. Courthouse
500 Camp Street, Chambers C-375
New Orleans, Louisiana 70130

Benjamin F. Graves
Six 53rd Street Circle
Gulfport, Mississippi 39507

George Saxon
306 45th Street
Gulfport, Mississippi 29507

Walter Eppes
4805 Poplar Springs Drive
Meridian, Mississippi 39301

Clare Sekul Hornsby
958 Howard Avenue
Biloxi, Mississippi 39530

Major General Joseph L. Fant, III
1209 Second Avenue, North
Columbus, Mississippi 39701

Hunter W. Lundy
One Lakeside Plaza
Suite 617
Lake Charles, Louisiana 70602

Dr. Aaron Henry
213 Fourth Street
Clarksdale, Mississippi 38164

Please do not hesitate to call me if further information is needed.

Sincerely,

Peter M. Brody

PMB/dmg:PMBWITLT.WX

cc: Peter E. Keith
House Managers
Michael Davidson

IN THE SENATE OF THE UNITED STATES
Sitting As A Court Of Impeachment

In re)
IMPEACHMENT OF)
WALTER L. NIXON, JR.)

JUDGE NIXON'S SECOND FURTHER DESIGNATION OF POTENTIAL EXHIBITS

Pursuant to the Impeachment Committee's Order, Judge Nixon, through his undersigned counsel, hereby designates the following materials as potential exhibits in these proceedings. All of these materials were exhibits in prior proceedings in Judge Nixon's case, and have been available to the House Managers throughout the pretrial period. These materials inadvertently were not previously designated as potential exhibits.

Ex. 32A. July 16, 1984 -- Letter from Lynn S. Jones to To Whom It May Concern

Ex. 53A. Declaration of Maurice Dantin

Ex. 68A. July 22, 1988 -- Letter from Prof. Geoffrey Hazard, Jr.

Ex. 75A. Production records for Wilkie Well.

Ex. 75B. Production records for Rogers Well 28-11.

Respectfully submitted,

Boyce Holleman
BOYCE HOLLEMAN
MICHAEL B. HOLLEMAN
BOYCE HOLLEMAN, P.A.
P.O. Drawer 1030
Gulfport, MS 39502
(601) 863-3142

David O. Stewart
DAVID OVERLOCK STEWART
PETER M. BRODY
ROPES & GRAY
1001 Pennsylvania Ave., N.W.
Suite 1200 South
Washington, D.C. 20004
(202) 626-3900

Date: September 1, 1989

IN THE SENATE OF THE UNITED STATES
Sitting As A Court of Impeachment

In re)
)
IMPEACHMENT OF)
JUDGE WALTER L. NIXON, JR.)

STIPULATION OF FACTS

The House of Representatives, through its Managers and counsel, and Respondent, Judge Walter L. Nixon, Jr., hereby stipulate to the following facts:

1. Walter L. Nixon, Jr., was appointed a United States District Judge for the Southern District of Mississippi in 1968.

2. Judge Nixon was designated Chief Judge of the United States District Court for the Southern District of Mississippi in 1982.

3. As a judge for the U.S. District Court for the Southern District of Mississippi, Judge Nixon heard cases in Biloxi, Hattiesburg, Meridian, Vicksburg and Jackson, Mississippi.

4. On August 29, 1985, Judge Nixon was indicted by a special grand jury sitting in Hattiesburg, Mississippi on one count of accepting an illegal gratuity in violation of 18 U.S.C. Section 201(g), and three counts of making false declarations before the grand jury, in violation of 18 U.S.C. Section 1623.

5. On February 9, 1986, following a two-week trial presided over by Judge James H. Meredith of the Eastern District of Missouri, and after deliberating for 18 hours, a federal petit jury sitting in Hattiesburg, Mississippi unanimously convicted Judge Nixon of two counts of making false declarations before the grand jury, while acquitting him of the illegal gratuity charge and the remaining false declaration charge.

6. On March 31, 1986, Judge Meredith denied post-trial motions for acquittal and a new trial by Judge Nixon.

7. On March 31, 1986, Judge Meredith sentenced Judge Nixon to five years imprisonment on each of the two perjury counts on which he had been convicted, with the sentences to run concurrently.

8. Judge Nixon was released on his own recognizance pending appeal of his convictions.

9. Judge Nixon has been suspended from the practice of law in Mississippi and Louisiana.

10. On April 30, 1987, the Fifth Circuit Court of Appeals affirmed Judge Nixon's criminal convictions, and thereafter denied Judge Nixon's petition for rehearing *en banc*.

11. On January 19, 1988 the United States Supreme Court denied Judge Nixon's petition for a writ of certiorari.

12. On February 11, 1988 the Judicial Council of the Fifth Circuit certified to the Judicial Conference, as provided by 28 U.S.C. Section 372(c)(7)(B), that Judge Nixon had engaged in conduct that might constitute grounds for impeachment.

13. On March 15, 1988, based on the criminal convictions, the Judicial Conference certified and transmitted to the Speaker of the House of Representatives a determination that Judge Nixon's impeachment may be warranted.

14. On March 23, 1988 Judge Nixon began serving his sentence at Eglin Air Force Base Prison Camp in Florida.

15. Judge Nixon relinquished all judicial responsibilities following his indictment in August 1985 and has not heard cases since that date.

16. Judge Nixon has continued to collect his judicial salary, currently $89,500 per year, through the present date.

17. After exhausting his appellate rights, Judge Nixon moved to vacate his criminal conviction and sentence through a petition filed pursuant to 28 U.S.C. Section 2255.

18. An evidentiary hearing on Judge Nixon's motion to vacate his conviction and sentence was held in Jackson, Mississippi on August 29 and 30, 1988.

19. After hearing evidence and argument by the parties, on December 19, 1988 Chief Judge John F. Nangle of the Eastern District of Missouri denied Judge Nixon's motion to vacate his conviction and sentence.

20. Judge Nixon appealed Chief Judge Nangle's December 19, 1988 ruling to the Fifth Circuit Court of Appeals. On August 17, 1989 the Fifth Circuit affirmed the lower court's ruling and declined to grant Judge Nixon a new trial. The time is still running on any further appeal.

21. Judge Nixon has moved for reduction of his sentence. That motion was denied by Chief Judge Nangle on May 19, 1989.

22. On March 17, 1988 a resolution calling for Judge Nixon's impeachment was introduced in the House of Representatives.

23. The impeachment resolution was referred to the Committee on the Judiciary of the House of Representatives, and subsequently to the Subcommittee on Civil and Constitutional Rights for investigation.

24. March 21, 1989, by a vote of 8 to 0, the Subcommittee on Civil and Constitutional Rights voted in favor of H.Res. 87, as amended, containing the three Articles of Impeachment of Judge Nixon currently before the Senate.

25. On April 25, 1989, by a vote of 34 to 0, the Committee on the Judiciary voted in favor of H. Res. 87, as amended, containing the three Articles of Impeachment of Judge Nixon currently before the Senate.

26. On May 16, 1989, by a vote of 417 to 0, the House of Representatives voted in favor of H. Res. 87, as amended, containing the three Articles of Impeachment of Judge Nixon currently before the Senate.

27. In February 1979, Judge Nixon approached Carroll Ingram, who was a friend and a Hattiesburg, Mississippi attorney who appeared before him.

28. In February 1979 when he first discussed with Carroll Ingram the possibility of an investment with Wiley Fairchild, Judge Nixon did not know Mr. Fairchild closely but knew he was in the construction business.

29. Wiley Fairchild selected partial interests in three wells, two in Mississippi and one in Alabama, to convey to Judge Nixon.

30. Wiley Fairchild selected the wells himself, without any discussion or negotiation with Judge Nixon over the specific wells or the price.

31. Judge Nixon contacted Carroll Ingram "a couple of times" in late 1979 to conclude his transaction with Wiley Fairchild, but was told by Mr. Ingram that Wiley Fairchild "is the kind of man you cannot push. He will take his own sweet time."

32. In February or March of 1980, Judge Nixon met with Wiley Fairchild at the office of W.R. Fairchild Construction Co. in Hattiesburg.

33. During his meeting with Judge Nixon in February or March of 1980, Wiley Fairchild told Judge Nixon that he had heard of Judge Nixon, wanted to meet him and that Mr. Ingram had recommended the Judge.

34. According to Judge Nixon, by the end of the meeting he and Wiley Fairchild had tentatively agreed to enter into an investment, with no negotiation over the price or other terms of the investment.

35. In February 1981, draft documents conveying royalty interests in three wells were drawn up at Wiley Fairchild's office by Robert L. "Skip" Jarvis, then a Fairchild employee.

36. The draft conveyances prepared by Mr. Jarvis were dated February 25, 1981.

37. The draft royalty deeds were reviewed by Carroll Ingram, Wiley Fairchild's attorney, and then returned to Mr. Fairchild.

38. The royalty deeds convey to Judge Nixon part of the interests owned by W.R. Fairchild Construction Co., Ltd. in two wells, and part of the interest owned by Fairchild-Windham Exploration Company in the third well.

39. As part of his transaction with Wiley Fairchild, Judge Nixon executed three promissory notes through which he agreed to pay W.R. Fairchild Construction Co. a total of $9500.00 at 10% interest, due and payable by February 25, 1983.

40. On February 20, 1981, during the same period when he was consummating his investment with Wiley Fairchild, Judge Nixon financed another oil investment with a third party by borrowing $10,000 from The Mississippi Bank, repayable within 90 days, at 15 percent interest.

41. Judge Nixon repaid the $9500 to Fairchild Construction Company with interest, but only after receiving royalty payments in greater amounts from Fairchild Construction Company such that he was never out-of-pocket.

42. Judge Nixon repaid much of his $9500 obligation to Fairchild Construction Company in advance of when repayment was due under the terms of the notes.

43. During the period February 1979 through January 1980, Judge Nixon presided over a civil case, The Boam Co., et. al v. Dependable Insurance Co., et al, in which W.R. Fairchild Construction Company was one of 18 parties.

44. Judge Nixon rendered judgments involving other parties in Boam in February 1979.

45. Judge Nixon ruled on a summary judgment motion in Boam affecting Fairchild Construction Company in August 1979.

46. Judge Nixon signed orders approving a pretrial settlement in Boam in September and October 1979, and dismissing Fairchild Construction Company from the case on January 30, 1980.

47. In March 1980 Judge Nixon assumed responsibility over a second case, Seymour V. L&A Contracting Co., et al., in which W.R. Fairchild Construction Company was named as the second of six defendants.

48. All counsel in the Boam and Seymour cases who have been interviewed have agreed that Judge Nixon showed no favoritism toward any party in either case.

49. On August 4, 1980, an airplane with 2,200 pounds of marijuana was seized by federal and local drug enforcement agents at the Hattiesburg Municipal Airport. Arrests were made at the scene and on August 19, 1980 an indictment was returned in federal court against three of the smugglers.

50. Drew Fairchild, Wiley Fairchild's 50 year-old son, was a participant in the smuggling conspiracy but was not prosecuted at that time.

51. Shortly after the indictment of the smugglers, Drew Fairchild and his lawyer, Bill Porter, approached Forrest County District Attorney Paul H. "Bud" Holmes to discuss Drew's legal situation.

52. Mr. Holmes told Mr. Porter to speak with George Phillips, United States Attorney for the Southern District of Mississippi, who was overseeing the federal prosecution of the drug case.

53. As a result of discussions with the U.S. Attorney's Office, on November 19, 1980 Drew Fairchild entered into a "Memorandum of Understanding" under which he agreed to plead guilty to felony charges, pay a $15,000 fine, and receive a sentence of 5 years probation in return for cooperating with the government in the drug case.

54. Drew Fairchild was subsequently debriefed by agents working with the U.S. Attorney's Office, who concluded that Drew was not being completely cooperative.

55. In March 1981 Bill Porter sued Drew Fairchild to collect a $10,000 legal fee in connection with his representation of Drew in the drug case.

56. Approximately one quarter of the fee claimed by Bill Porter was paid by Wiley Fairchild on July 3, 1981, but Mr. Porter complained to Bud Holmes about his inability to collect the full fee from Drew.

57. On August 26, 1981 the Forrest County grand jury returned an indictment against Drew Fairchild and Robert Watkins, the pilot in the drug-smuggling conspiracy.

58. Drew Fairchild was arraigned on September 3, 1981 with his attorney, Bill Porter, present. Mr. Porter demanded the remainder of his $10,000 fee "up front." In order to obtain the money, Wiley Fairchild made his son Drew turn over numerous oil leases owned by Drew. Wiley Fairchild then paid Mr. Porter the remainder of the fee.

59. In December 1981 Robert Watkins was apprehended in Florida and proceedings to extradite Mr. Watkins were initiated.

60. Drew Fairchild's sentencing was scheduled for March 19, 1982, but was delayed due to his back surgery.

61. In May 1982 Robert Watkins failed to appear at a scheduled hearing and his bond was revoked.

62. Drew Fairchild's case was continued through the summer of 1982.

63. In October 1982 Mr. Watkins was apprehended in Florida, and extradition proceedings began again.

64. Drew Fairchild's sentencing was continued again in November 1982 because Mr. Watkins had been apprehended.

65. On December 23, 1982, pursuant to a motion prepared at the direction of Forrest County District Attorney Bud Holmes, Drew Fairchild's drug cases was "passed to the file." As a matter of local practice, this meant that Drew's case was put on the inactive list.

66. Drew and Wiley Fairchild were extremely pleased with the passing of the case to the file and believed that Drew's legal problems were finally at an end. This disposition of the case was not requested nor even anticipated by Drew.

67. In early January 1983, Forrest County Circuit Court Judge Dickie McKenzie took office after defeating the incumbent, Judge Jack Weldy, in an election.

68. Judge McKenzie observed that the Drew Fairchild case had been passed to the file, expressed his concern about what had occurred, and the matter was reported in the local news media.

69. Robert Watkins was returned to Hattiesburg and arraigned on January 26, 1983. On that same date, one month after passing the case to the files, Mr. Holmes reinstated the Drew Fairchild case to the active docket.

70. While at Mr. Holmes' farm, and after speaking with Mr. Holmes about his [Judge Nixon's] meeting earlier that day with Wiley Fairchild, Judge Nixon spoke with Wiley Fairchild on the telephone.

71. In his telephone conversation with Judge Nixon, Wiley Fairchild thanked Judge Nixon for speaking with Mr. Holmes about the handling of Drew Fairchild's case and told Judge Nixon, "I'm satisfied."

72. At his criminal trial Judge Nixon denied that he was in Hattiesburg on May 14, 1982. Judge Nixon testified that he was "positive" that he was in his chambers in Biloxi preparing for an upcoming asbestos case on the afternoon of May 14, 1982.

73. Contrary to his trial testimony, Judge Nixon was in fact in Hattiesburg on May 14, 1982, as established during post-trial proceedings through dental records confirming that the Judge received treatment in Hattiesburg on that date.

74. On November 3, 1983 an anonymous informant telephoned the Federal Bureau of Investigation and suggested that Wiley Fairchild may have conveyed mineral interests to Judge Nixon as a bribe for favorable treatment in Drew Fairchild's drug case.

75. The informant thereafter identified himself as Robert Jarvis, a former employee of Wiley Fairchild and presently an Assistant States' Attorney in Florida.

76. In the spring of 1984 the Public Integrity Section of the Department of Justice, with the assistance of the FBI, commenced an investigation into Judge Nixon's investment with Wiley Fairchild and the handling of the Drew Fairchild drug case.

77. As part of the investigation, an attorney with the Department of Justice and an FBI agent interviewed Judge Nixon in the Judge's chambers in Biloxi, Mississippi on April 19, 1984.

78. The April 19, 1984 interview of Judge Nixon was tape-recorded with Judge Nixon's full consent.

79. Judge Nixon appeared voluntarily before the grand jury and testified under oath on July 18, 1984.

80. Judge Nixon retained counsel prior to his grand jury appearance and was represented by counsel at the time of his testimony.

81. Prior to his July 1984 grand jury testimony Judge Nixon swore to tell the truth, the whole truth, and nothing but the truth.

82. On September 6, 1984, the Hattiesburg grand jury indicted Wiley Fairchild on charges of perjury and paying an illegal gratuity to Judge Nixon. The gratuity count was based upon the royalty payments from Fairchild Construction Company to Judge Nixon.

83. On November 26, 1984 Wiley Fairchild pled guilty to the gratuity charge. The perjury count was dismissed as part of the plea bargain, and in September 1985 Mr. Fairchild was sentenced to two months of incarceration, served at a halfway house in Jackson, Mississippi.

84. In March 1985 Bud Holmes was indicted by the Hattiesburg grand jury on charges of perjury and obstruction of justice that in part alleged he had concealed evidence about the phone call with Wiley Fairchild from Mr. Holmes farm.

85. Bud Holmes' criminal trial began on June 17, 1985. After jury selection Mr. Holmes agreed to plead guilty to a criminal information charging him with contempt, with part of his contemptuous behavior being that he " . . . refused to disclose the substance of the aforementioned telephone call . . . ."

86. The Department of Justice also prosecuted Robert Royals, Drew Fairchild's co-manager at the Hattiesburg airport, who had never been prosecuted by Mississippi authorities. Mr. Royals was indicted by the special federal grand jury, convicted and sentenced to three years imprisonment for his role in the drug-smuggling conspiracy.

STIPULATED AND AGREED TO BY:

The United States House
of Representatives

By Alan I. Baron (PEK)
Alan I. Baron
Special Counsel
Peter E. Keith
Assistant Special Counsel

David O. Stewart
David O. Stewart
Peter M. Brody
Ropes & Gray
Counsel for Respondent
Judge Walter L. Nixon, Jr.

Managers of the House of
Representatives

Jack Brooks
Don Edwards
Benjamin L. Cardin
F. James Sensenbrenner
William E. Dannemeyer

Date: September 6, 1989

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September 6, 198

VIA HAND-DELIVERY

The Honorable Wyche Fowler, Jr.
Chairman
Impeachment Trial Committee
Hart Senate Office Building
Room SH 902-D
Washington, D.C. 20510

Attention: Anthony Harvey

Dear Mr. Harvey:

Judge Nixon may wish to present the following additional character witness:

Will Denton
955 Howard Avenue
Biloxi, Mississippi 39530

In consideration of the timeframe indicated by the Senate for the Hearing, we have determined not to present the following three character witnesses listed in my letter of September 1, 1989:

Clare Sekul Hornsby
958 Howard Avenue
Biloxi, Mississippi 39530

Major General Joseph L. Fant, III
1209 Second Avenue, North
Columbus, Mississippi 39701

Dr. Aaron Henry
213 Fourth Street
Clarksdale, Mississippi 38164

Please do not hesitate to call me if further information is needed.

Sincerely,

Peter M. Brody

PMB/mej:PMBWFLTR.WX

cc: Peter E. Keith
House Managers
Michael Davidson

IMMUNIZATION OF WITNESS TESTIMONY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IMPEACHMENT TRIAL COMMITTEE
ON THE ARTICLES AGAINST
JUDGE WALTER L. NIXON, JR.

The United States Senate
Washington, D.C. 20510,

Applicant.

Misc. No. 89-175

APPLICATION FOR ORDER IMMUNIZING TESTIMONY AND OTHER INFORMATION PROVIDED BY ROBERT ROYALS

1. The Impeachment Trial Committee on the Articles Against Judge Walter L. Nixon, Jr. applies to this Court for an order, pursuant to 18 U.S.C. §§ 6002 and 6005, immunizing, from use in prosecutions, testimony and other information provided by one of its potential witnesses, Robert Royals, at proceedings of the Impeachment Trial Committee.

2. The presiding officer of the Senate has appointed, pursuant to Senate Resolution 128, 101st Congress, and Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, the Impeachment Trial Committee to receive evidence and take testimony on the articles of impeachment against Judge Walter L. Nixon, Jr. at such times and places as the committee may determine. A copy of Senate Resolution 128 as agreed to on May 11, 1989, is attached as Exhibit A; a copy of Impeachment Rule XI is attached as Exhibit B.

3. On July 14, 1989, by a vote of ten of its twelve members, the Impeachment Trial Committee adopted a resolution directing the Senate Legal Counsel to apply for an order immunizing testimony and other information provided by the witness at its proceedings. The committee's resolution is attached as Exhibit C.

4. It is anticipated that the witness would invoke his constitutional privilege against self-incrimination if subpoenaed to testify.

6. In accordance with 18 U.S.C. § 6005, we notified the Attorney General on July 25, 1989, of the Impeachment Trial Committee's intention to request this order. A copy of the notice to the Attorney General is attached as Exhibit D. A certificate of service of Exhibit D is attached as Exhibit E.

7. We have been authorized to represent to this Court that the Attorney General will not request this Court, under 18 U.S.C. § 6005(c), to defer the issuance of an immunity order for this witness.

Wherefore, the Impeachment Trial Committee on the Articles Against Judge Walter L. Nixon, Jr., respectfully requests that this Court issue an order immunizing from use in prosecutions testimony and other information provided by Robert Royals, at proceedings of the Committee.

Respectfully submitted,

Michael Davidson
Senate Legal Counsel

Ken U. Benjamin, Jr.
Deputy Senate Legal Counsel

Morgan J. Frankel
Assistant Senate Legal Counsel

642 Hart Senate Office Building
Washington, D.C. 20510
(202) 224-4435

Counsel for Impeachment
Trial Committee on the Articles
Against Walter L. Nixon, Jr.

Dated: August 14, 1989

III

101st CONGRESS
1st Session

S. RES. 128

To provide for the appointment of a committee to receive and to report evidence with respect to articles of impeachment against Judge Walter L. Nixon, Jr.

IN THE SENATE OF THE UNITED STATES

May 11 (legislative day, January 3), 1989

Mr. Mitchell (for himself and Mr. Dole) submitted the following resolution; which was considered and agreed to

---

RESOLUTION

To provide for the appointment of a committee to receive and to report evidence with respect to articles of impeachment against Judge Walter L. Nixon, Jr.

Resolved, That pursuant to rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, the Presiding Officer shall appoint a committee of twelve Senators to perform the duties and to exercise the powers provided for in the rule.

Sec. 2. The majority and minority leader shall each recommend six members to the Presiding Officer for appointment to the committee. The committee shall designate one of its members to be chairman and one of its members to be vice chairman.

EXHIBIT A

SEC. 3. The committee shall be deemed to be a standing committee of the Senate for the purpose of reporting to the Senate resolutions for the criminal or civil enforcement of the committee's subpoenas or orders, and for the purpose of printing reports, hearings, and other documents for submission to the Senate under rule XI.

SEC. 4. During proceedings conducted under rule XI the chairman of the committee is authorized to waive the requirement under the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials that questions by a Senator to a witness, a manager, or counsel shall be reduced to writing and put by the presiding officer.

SEC. 5. In addition to a certified copy of the transcript of the proceedings and testimony had and given before it, the committee is authorized to report to the Senate a statement of facts that are uncontested and a summary, with appropriate references to the record, of evidence that the parties have introduced on contested issues of fact.

SEC. 6. The actual and necessary expenses of the committee, including the employment of staff at an annual rate of pay, and the employment of consultants with prior approval of the Committee on Rules and Administration at a rate not to exceed the maximum daily rate for a standing committee of the Senate, shall be paid from the contingent fund of the Senate from the appropriation account "Miscellaneous

Items" upon vouchers approved by the chairman of the committee, except that no voucher shall be required to pay the salary of any employee who is compensated at an annual rate of pay.

SEC. 7. The Secretary shall notify the House of Representatives and counsel for Judge Walter L. Nixon, Jr., of this resolution.

○

RULES OF PROCEDURE AND PRACTICE IN THE SENATE WHEN SITTING ON IMPEACHMENT TRIALS

110 XI. That in the trial of any impeachment the Presiding Officer of the Senate, if the Senate so orders, shall appoint a committee of Senators to receive evidence and take testimony at such times and places as the committee may determine, and for such purpose the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials.

Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed. The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

EXHIBIT B

101ST CONGRESS
1ST SESSION

RESOLUTION

of the Impeachment Trial Committee on the Articles Against Walter L. Nixon, Jr.

To immunize from use in prosecution the testimony of, and other information provided by, Robert Royals

July 17, 1989

MR. FOWLER, the Chairman of the Impeachment Trial Committee on the Articles Against Judge Walter L. Nixon, Jr., submitted the following resolution to the Committee, which approved it by a vote of ten of its twelve members on the 14th day of July, 1989.

Whereas, the Impeachment Trial Committee on the Articles Against Judge Walter L. Nixon, Jr. has been appointed, pursuant to Senate Resolution 128, 101st Congress, and Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, to receive evidence and take testimony on the articles of impeachment against Judge Walter L. Nixon, Jr.;

Whereas, the Committee may require Robert Royals to testify and provide other information at its proceedings;

Whereas, the Committee anticipates that Robert Royals may refuse to testify or provide other information at its proceedings on the ground of self-incrimination; and

Whereas, pursuant to 18 U.S.C. §§ 6002 and 6005, a committee of the Senate may seek, by two-thirds vote, a court order immunizing testimony and other information provided by a witness from use in prosecutions other than for perjury, giving a false statement, or otherwise failing to comply with the court order: Now, therefore, be it

Resolved, That the Impeachment Trial Committee on the Articles Against Judge Walter L. Nixon, Jr., pursuant to 2 U.S.C. §§ 288b(d) and 288f, directs the Senate Legal Counsel to apply for a court order immunizing from use in prosecutions the testimony of, and other information provided by, Robert Royals, at proceedings of the Committee.

Attest: A True Copy

Anthony L. Harvey

Anthony L. Harvey
Committee Administrator

EXHIBIT C

MICHAEL DAVIDSON
COUNSEL
KEN U. BENJAMIN, JR.
DEPUTY COUNSEL
MORGAN J. FRANKEL
ASSISTANT COUNSEL

Phone: (202) 224-4435
Telecopier: (202) 224-3391

United States Senate
OFFICE OF SENATE LEGAL COUNSEL
Washington, DC 20510-7250

NOTICE OF INTENTION TO REQUEST
ORDER CONFERRING IMMUNITY

TO: The Honorable Dick Thornburgh
The Attorney General of the United States
Washington, D.C. 20530

Please take notice that the undersigned, as representative of the Impeachment Trial Committee on the Articles Against Walter L. Nixon, Jr., will request the United States District Court for the District of Columbia, pursuant to 18 U.S.C. § 6005 and 2 U.S.C. §§ 288b(d) and 288f, to issue an order immunizing from use in prosecutions the testimony of, and other information provided by, Robert Royals at proceedings of the committee.

Michael Davidson
Michael Davidson
Senate Legal Counsel
642 Senate Hart Office Building
Washington, D.C. 20510
(202) 224-4435

Dated: July 25, 1989

EXHIBIT D

CERTIFICATE OF SERVICE

I certify that on July 25, 1989, in accordance with 18 U.S.C. § 6005(b)(3), notice of the intention of the Impeachment Trial Committee on the Articles Against Walter L. Nixon, Jr. to seek an order conferring immunity upon Robert Royals was hand delivered to the Office of Legislative Affairs of the Department of Justice.

Michael Davidson

Michael Davidson
Senate Legal Counsel

EXHIBIT E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IMPEACHMENT TRIAL COMMITTEE ON THE ARTICLES AGAINST JUDGE WALTER L. NIXON, JR. The United States Senate Washington, D.C. 20510, Applicant.	Misc. No. 89-____

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION FOR ORDER IMMUNIZING TESTIMONY AND OTHER INFORMATION PROVIDED BY ROBERT ROYALS

The Impeachment Trial Committee on the Articles Against Judge Walter L. Nixon, Jr., appointed pursuant to Senate Resolution 128 of the 101st Congress and Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, is applying to this Court for an order immunizing testimony and other information which may be provided to the committee by Robert Royals. The application is presented pursuant to 18 U.S.C. § 6005, which provides, in relevant part:

> § 6005. Congressional proceedings.
>
> (a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before either House of Congress, or any committee ... of either House, ... a United States district court shall issue, in accordance with subsection (b) of this section, upon the request of a duly authorized representative of the House of Congress or the committee concerned, an order

> requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.
>
> (b) Before issuing an order under subsection (a) of this section, a United States district court shall find that--
>
> (1) * * * *
>
> (2) in the case of a proceeding before a committee ... of either House of Congress ... the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee; and
>
> (3) ten days or more prior to the day on which the request for such an order was made, the Attorney General was served with notice of an intention to request the order.
>
> (c) Upon application of the Attorney General, the United States district court shall defer the issuance of any order under subsection (a) of this section for such period, not longer than twenty days from the date of the request for such order, as the Attorney General may specify.

This law provides the mechanism by which a witness before a congressional committee receives "use immunity" for testimony. The immunized witness remains subject to prosecution for the transactions about which he or she testifies if the government sustains the burden of proving at trial that it did not use the immunized testimony or its fruits in the prosecution. See Kastigar v. United States, 406 U.S. 441, 459-62 (1972). Because the court's inquiry on an application for an immunity order is narrow and its tests are mechanical, the application may be decided ex parte without a hearing.

Ryan v. Commissioner of Internal Revenue, 568 F.2d 531, 540 (7th Cir. 1977), cert. denied, 439 U.S. 820 (1978).[1]

Section 6005 sets out the two requirements for an immunity order, both of which have been met.[2] First, "in the case of a proceeding before a committee ... of either House of Congress ... the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee." 18 U.S.C. § 6005(b)(2). The Impeachment Trial Committee's resolution (Exhibit C to the application) shows that the Committee approved this request for an order by a vote of ten of its twelve members on July 14, 1989.

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[1] The court noted in Ryan that "nothing in the statute bars the court ... from notifying the witness, ... or hearing any objections," but "these procedures are not required by the constitution or by the immunity statute." Id. at 540. In In the Matter of the Application of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, Misc. No. 89-129-LFO (D.D.C. Order of June 19, 1989), the Court provided notice to the last Senate witness to be immunized, William A. Borders, Jr., heard his objection, and issued the immunity order over the objection. Order of June 27, 1989. Mr. Borders appealed from the immunity order, No. 89-5189 (D.C. Cir.), and the committee moved to dismiss the appeal or for summary affirmance. That motion is currently pending. Following Mr. Borders' refusal to testify despite his immunization, the committee initiated a civil enforcement proceeding in this Court to obtain a court order directing him to comply with the committee's subpoena. Misc. No. 89-129 (D.D.C.). Mr. Borders' immunity proceeding presents a question concerning the proper procedures for the Department of Justice to waive the ten-day waiting period for an immunity application, which is not implicated in this application, because more than ten days have elapsed since the Attorney General was notified of the Committee's intention to file this application. See page 4 infra.

[2] The Impeachment Trial Committee may apply for this order prior to summoning the witness to testify or provide information at one of its proceedings. In re Application of United States Senate Permanent Subcommittee on Investigations (Cammisano), 655 F.2d 1232, 1236-38 (D.C. Cir.), cert. denied, 454 U.S. 1084 (1981).

Second, "ten days or more prior to the day on which the request for such an order was made, the Attorney General was served with notice of an intention to request the order." 18 U.S.C. § 6005(b)(3). The accompanying certificate (Exhibit E to the application) shows that the Attorney General was served on July 25, 1989 with notice of our intention to request this order (Exhibit D to the application).

Accordingly, the Impeachment Trial Committee requests that the Court issue an order immunizing the testimony and other information which Robert Royals may provide at the Committee's proceedings.

Respectfully submitted,

Michael Davidson
Senate Legal Counsel

Ken U. Benjamin, Jr.
Deputy Senate Legal Counsel

Morgan J. Frankel
Assistant Senate Legal Counsel

642 Hart Senate Office Building
Washington, D.C. 20510
(202) 224-4435

Counsel for Impeachment Trial
Committee on the Articles
Against Walter L. Nixon, Jr.

Dated: August 14, 1989

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IMPEACHMENT TRIAL COMMITTEE
ON THE ARTICLES AGAINST
JUDGE WALTER L. NIXON, JR.

The United States Senate
Washington, D.C. 20510,

Applicant.

Misc. No. 89-175

ORDER

Upon consideration of the application by the Impeachment Trial Committee on the Articles Against Judge Walter L. Nixon, Jr., and upon determining that the procedural requirements set forth in 18 U.S.C. § 6005 have been satisfied, it is, this _____ day of August, 1989,

ORDERED That Robert Royals may not refuse to testify, and provide other information, at proceedings of the Impeachment Trial Committee on the Articles Against Judge Walter L. Nixon, Jr., on the basis of his privilege against self-incrimination, and it is

FURTHER ORDERED That no testimony or other information compelled under this Order (or any information directly or indirectly derived from such testimony or other information) may be used against him in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this Order.

____
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
AUG 15 1989
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

IMPEACHMENT TRIAL COMMITTEE
ON THE ARTICLES AGAINST
JUDGE WALTER L. NIXON, JR.

The United States Senate
Washington, D.C. 20510,

Applicant.

Misc. No. 89-175

ORDER

Upon consideration of the application by the Impeachment Trial Committee on the Articles Against Judge Walter L. Nixon, Jr., and upon determining that the procedural requirements set forth in 18 U.S.C. § 6005 have been satisfied, it is,

this 15 day of August, 1989,

ORDERED That Robert Royals may not refuse to testify, and provide other information, at proceedings of the Impeachment Trial Committee on the Articles Against Judge Walter L. Nixon, Jr., on the basis of his privilege against self-incrimination, and it is

FURTHER ORDERED That no testimony or other information compelled under this Order (or any information directly or indirectly derived from such testimony or other information) may be used against him in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this Order.

United States District Judge

United States District Court
for the District of Columbia
A TRUE COPY

JAMES F. DAVEY, CLERK
By Cynthia Clark
Deputy Clerk
August 22, 1989

OTHER PRETRIAL MATTERS

WYCHE FOWLER, JR., GEORGIA, CHAIRMAN
ORRIN G. HATCH, UTAH, VICE CHAIRMAN

HOWELL HEFLIN, ALABAMA
TIMOTHY E. WIRTH, COLORADO
HARRY REID, NEVADA
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JAMES M. JEFFORDS, VERMONT
CONNIE MACK, FLORIDA

ANTHONY L. HARVEY, ADMINISTRATOR
MORGAN J. FRANKEL, COUNSEL
DONALD A. PURDY, JR., COUNSEL
P. CASEY McGANNON, STAFF ASSISTANT
ISABEL T. McVEIGH, STAFF ASSISTANT

PHONE: (202) 224-8471
TELECOPIER: (202) 224-8677

United States Senate

IMPEACHMENT TRIAL COMMITTEE
(ON THE ARTICLES AGAINST JUDGE WALTER L. NIXON, JR.)
HART SENATE OFFICE BUILDING, ROOM SH-902D
WASHINGTON, DC 20510

August 17, 1989

The Honorable J. Michael Quinlan
Director
Federal Bureau of Prisons
U.S. Department of Justice
320 First Street, Northwest
Washington, DC 20534

Dear Mr. Quinlan:

The Senate Impeachment Trial Committee on the Articles Against Judge Walter L. Nixon, Jr., of which I am Chairman, is conducting its evidentiary hearings beginning September 7, 1989; these hearings are scheduled to continue through the following week, concluding on September 15, 1989. In addition to being the respondent to these articles of impeachment, Judge Nixon has been called by counsel to testify as a witness in his own defense.

I am therefore writing to request Judge Nixon's presence at these proceedings. It is my understanding that Judge Nixon has been furloughed from the Federal Prison Camp at Eglin Air Force Base to a half way house, the address of which is 3801 Pitt Street, New Orleans, LA, 70115.

Thank you for your cooperation in this matter.

Sincerely,

Wyche Fowler, Jr.

Wyche Fowler, Jr.
Chairman

CC: Mr. Robert English
Community Corrections Manager
Federal Bureau of Prisons
701 Loyola Avenue, Room T-3025
New Orleans, LA 70113

U.S. Department of Justice

Federal Bureau of Prisons

Office of the Director

Washington, DC 20534

Honorable Wyche Fowler, Jr.
United States Senate
Chairman, Impeachment Trial Committee
on the Articles Against Judge Walter L. Nixon, Jr.
Hart Senate Office Building, Room SH-902D
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your letter of August 17 requesting the presence of Judge Walter Nixon, Jr., a resident of the Volunteers of America Community Residential Center, New Orleans, Louisiana, at your Committee's evidentiary hearings September 7-15, 1989.

Your request has been discussed with our Community Corrections Manager in New Orleans, and I am advised that in the event Judge Nixon elects to attend the hearings, he may do so without escort.

Please let me know if I can be of additional service.

Sincerely,

J. Michael Quinlan
Director

In the Senate of the United States,

September 6, 1989

Ordered, That pursuant to Senate Resolution 128, One Hundred Congress, the President pro tempore, upon the recommendation of the Majority Leader and the Minority Leader, appoints Mr. Symms, as a member of the committee to receive and report evidence in the impeachment of Judge Walter L. Nixon, Jr., judge of the United States District Court for the Southern District of Mississippi, vice Mr. Hatch, resigned.

Attest:

Walter J. Stewart

Secretary.